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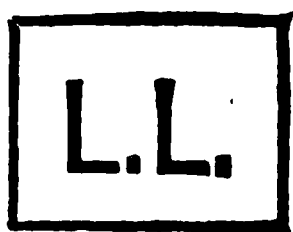
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REPORTS

OF CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

Parts of September Term, 1883, and February Term, 1884.

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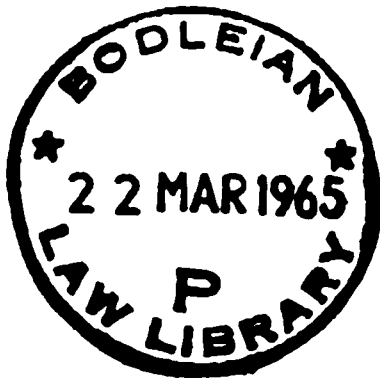
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*Judge Clark's term of office having expired, Judge Dorsey was appointed to succeed him. He qualified January 1, 1884.

†Judge Dorsey having died, Judge Prior was appointed to succeed him. He qualified January 8, 1884.

NOTE.

By the Act of 1866 (section 4270 of the Code), the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced are published as the opinions of the Justices delivering them, the head-notes generally being made by the Reporter. Where head-notes are made by the Court, it is so stated.

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CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Georgia,
AT ATLANTA.

SEPTEMBER TERM, 1883.

PRESENT—JAMES JACKSON, CHIEF JUSTICE.
SAMUEL HALL, ASSOCIATE “
M. H. BLANDFORD, ASSOCIATE “

COMER & COMPANY vs. ALLEN.

1. The charge fully and fairly submitted the case, and the verdict was supported by the evidence.
2. As to her separate property, a wife is a *feme sole*. If her husband has become indebted to her in connection therewith, she may take a mortgage to secure her claim, and she will have the same rights as against other creditors of the husband as if she were not his wife; provided the debt so secured is a *bona fide*, subsisting debt, and the transaction is without fraud. Whether such is the case is for the jury.
3. Where a marriage took place prior to the passage of the act of 1866, the husband had the right to reduce his wife's property to possession as his own, and he could still do so after the passage of the act; but if thereafter he reduced it to possession for her, as her estate, and in consideration of having made use of it for his own purposes, gave her a mortgage *bona fide* to secure the debt so created, the lien was good, and took precedence of the subsequently acquired liens of other creditors, although he may have been in failing circumstances.
4. Although a debt from a husband to his wife may have been barred by the statute of limitations, it could be revived by written acknowledgment. The statute does not extinguish the debt; it only bars the remedy. The making of a new promise by the hus-

Comer & Company vs. Allen.

band to the wife is not *per se* fraudulent, but is a circumstance to be considered in investigating the fairness of the transaction.

(a.) It appears that the holders of the junior mortgage in this case had notice of the mortgage of the wife, and it was included in the face of their own mortgage. Were they estopped from denying the validity of her mortgage? *Quære.*

5. If a request to charge was not proper as a whole, it might have been refused; but it did no harm in this case that the portions which were proper were given by the court, who stated that they were given at the request of counsel.

November 20, 1883.

Debtor and Creditor. Husband and Wife. Fraud. Statute of Limitations. Mortgage. Notice. Practice in Superior Court. Before Judge STEWART. Monroe Superior Court. February Term, 1883.

Reported in the decision.

DENMARK & ADAMS; BERNER & TURNER, for plaintiffs in error.

JOHN I. HALL; A. D. HAMMOND; T. B. CABANISS, for defendant.

HALL, Justice.

On the 11th day of November, 1881, Mrs. Martha E. Allen took from her husband, G. D. Allen, a mortgage on the land and property therein mentioned, to secure a note of even date with the same, given for a past indebtedness from the husband to her, amounting to \$2,715. This mortgage was duly recorded, and was foreclosed. On the 22d day of November, 1881, G. D. Allen executed and delivered to H. M. Comer & Co. a mortgage on the same property, to secure a large debt due H. M. Comer & Co., from Dumas & Allen, of which latter firm Allen was a partner. Prior to and at the time of the execution of this mortgage, notice was given to Comer & Co., through the agent and attorney conducting the business for them, not

Comer & Company vs. Allen

only of Mrs. Allen's mortgage but of others of older date, upon the same premises. This last mortgage was recorded, and likewise foreclosed. When the mortgaged land was levied on and about to be sold, Mrs. Allen placed in the hands of the sheriff the *fi fa.* issuing upon the judgment of foreclosure of the mortgage in her favor, for the purpose of claiming the proceeds of the sale. Comer & Co. filed an affidavit of illegality to her *fi fa.*, contesting its validity, and set forth in said affidavit the following grounds:

(1.) That said George D. Allen, at the time of giving to his said wife, Mrs. Martha E. Allen, the said mortgage, was not *bona fide* indebted to his said wife in any way whatever.

(2.) That said George D. Allen signed and executed said mortgage in favor of his wife (if the same was ever executed at all) for the sole purpose of defrauding his creditors, and not for the purpose of securing to his wife any just or *bona fide* debt.

(3.) That said mortgage was signed and placed on record after the failure in business of the said Dumas & Allen, for the sole purpose, on the part of said Allen, to defeat the payment of the just debts of his creditors and the creditors of his firm.

(4.) That said mortgage in favor of the said Mrs. Martha E. Allen is without any consideration to support it.

(5.) That, as deponent is informed and believes, while said mortgage purports to have been signed, sealed and delivered by said G. D. Allen to his said wife on the 11th day of November, A. D. 1881, the same was not, in fact, delivered on said day, and was not delivered at the time said G. D. Allen gave to deponent's firm his said mortgage bearing date the 22d day of November, A. D. 1881.

(6.) That said G. D. Allen, at the time of executing the mortgage to H. M. Comer & Co. (as deponent believes), had the said mortgage in favor of his said wife in his own possession and control, and had not then delivered the same to his said wife.

(7th.) That on or about the time that said Allen executed his said mortgage to deponent's said firm, he stated that the consideration of the mortgage to his said wife was for money which he, the said G. D. Allen, had borrowed or otherwise obtained from the father of his said wife, which money he had used in his business as his own, and without the knowledge of these contestants or his other creditors.

(8.) That if in equity the said G. D. Allen ever owed to his wife the said sum of money, or any part thereof, by reason of the fact of obtaining the same from his wife's father, said claim was, at the time of giving her the said mortgage, barred by the statute of limitations; and that, if the said Mrs. Martha E. Allen ever had any legal claim or the same against her husband, she had allowed said Allen to use the same in his business as his own, and not as the debtor of his said wife; and that it is a fraud on his creditors now to permit her to take the same from his creditors, particularly after his failure in business, and when his said wife had never before made any claim on her said husband for the same.

"And deponent further says that the property, on which his said firm holds said mortgage, is insufficient to pay off the debt of said H. M. Comer & Co., and that said George D. Allen is insolvent. And the said H. M. Comer & Co. herewith tender bond with good security, in terms of the law, and pray that the issue here made may be returned and determined as the law provides.

"And for further grounds of contest, deponent says that, on the 18th day of April, 1881, the said G. D. Allen borrowed of H. M. Comer & Co. the sum of three thousand dollars, for which he gave the firm note of Dumas & Allen, due the 15th day of October after the date thereof; and afterwards a further sum of three thousand dollars, giving the firm note of Dumas & Allen, dated April 30th, 1881, and due the 15th November thereafter, with 8 per cent interest; and the said Dumas & Allen also borrowed on

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open account the sum of six thousand dollars; and at the time said loans were made, the said mortgagors stated to the said H. M. Comer & Co. that there was no encumbrance on said property, and said loans were made on said statement, and that said mortgage, given by said G. D. Allen to his wife is, in law, a fraud upon the rights of these deponents, they having given said credit upon the statement of the said G. D. Allen that said property was unencumbered, and that his said firm was solvent, when, in truth, it was insolvent."

These several grounds of illegality were traversed and denied by Mrs. Allen; and upon the trial of the issue thus formed, much testimony was taken; and the testimony being closed, the presiding judge delivered the following charge to the jury:

"If Mrs. Allen had a valid, legal, subsisting debt against her husband, and if she, in a transaction free from fraud, took a mortgage from her husband to secure the same, then you would be authorized to find that said mortgage *fi. fa.* proceed. But I charge you, if the said plaintiff, Mrs. Allen, did not have a valid, legal, subsisting debt, or if she did hold a debt against her husband, if she took a mortgage to secure the same, which was not free from fraud in a transaction between her and her husband, then you would not be authorized to find that the *fi. fa.* proceed, but would find in favor of the defendant, Comer.

"The defendant, Comer, by his illegality insists that the said G. D. Allen was not due his said wife any sum of money whatsoever. If this be true, then, although a mortgage may have been given, the same would be without consideration, and would be void, and you would so find.

"Again, the defendant, Comer, insists that the said transaction of giving the mortgage by the said G. D. Allen, to the said plaintiff, was fraudulent and void, as to the creditors of the said G. D. Allen. Fraud will not be presumed, but being subtle in its nature, slight circumstances will carry conviction of its existence; and transactions between husband and wife should be scanned with care, and should be free from fraud, and fair in every particular; and in order to determine whether the transaction is free from fraud or not, you would be authorized to consider all the circumstances proved in the case.

"You might consider whether the debt claimed by Mrs. Allen was or not barred by the statute of limitations at the time of giving the mortgage. You might consider whether the debt was evidenced by

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note, account, or other writing. You might consider whether mortgage was given as the result of an agreement between Mrs. Allen and her husband, or whether the same was given freely, voluntarily.

“You might consider whether or not said mortgage included all the defendant’s property or not. You might consider whether said mortgage was given to hinder or delay creditors, or whether the same was given fairly and in good faith; and from all those considerations and facts together, and from all the facts and circumstances proved in the case, and find and determine whether or not the mortgage as given was a fraud upon Comer & Co., as a creditor, by G. D. Allen, and if so, you would find in favor of Comer & Co. But I charge you, if you find that G. D. Allen was indebted to his wife, the plaintiff, a valid and subsisting debt, the fact that he was insolvent at the time of making the mortgage, would not invalidate the same if the transaction was free from fraud; as Allen (although insolvent) under the law, had the right to prefer his creditors; and if you therefore find that Allen was insolvent, yet if the transaction was free from fraud, you would be authorized to find in favor of Mrs. Allen.

“I have been requested to charge you as follows, by the counsel for plaintiff, Mrs. Allen:

“The first question for you to determine is, was G. D. Allen indebted to his wife? If you find that Allen was indebted to his wife, then your next question is, was this mortgage made in good faith? If Allen made the mortgage to his wife with the intention to hinder and delay his creditors, and if his wife knew of such intention, or had grounds for reasonable suspicion that such was the intention of Allen, then the mortgage would be void as to creditors. But, although it may have been the intention of Allen to hinder and delay his creditors, yet if his wife did not know, or have reasonable grounds to suspect, that the intention of Allen was to delay or defraud creditors, then the mortgage would be good. A debtor may prefer any creditor, whether such be his wife or another person. The rule is, that transactions between husband and wife will be scanned closely, but fraud will not be presumed in any case, but being in its nature subtle, slight circumstances may be sufficient to establish its existence. There is a moral obligation on the part of a debtor to pay a debt that is barred by the statute of limitations, and if a contract such as a note and mortgage are given to pay such a debt, it is as binding as if the debt had never been barred. If you believe from the evidence that the money received by Allen arose from the sale or use of Mrs. Allen’s property by her father after 1866, then the father of Mrs. Allen could not give the money to Mr. Allen.

“As requested by counsel for Comer & Co., I charge you, that transactions between husband and wife by which the rights of cred-

Factors are affected, should be scanned by the jury closely, and the *bona fides* of the transaction should be clearly established. The law looks with stricter scrutiny on such transactions than it does on transactions between other persons. In considering the *bona fides* of the transaction, the jury may consider all the facts proved in the case.

"Again, I charge you that an open account becomes barred within four years after the same becomes due; and if the debt held by Mrs. Allen against G. D. Allen was an open account, the same would become barred after the lapse of four years, and Allen would be under no legal liability to pay the claim, and if the same was sued for collection, and the statute of limitations was pleaded, the same could not be collected. But as I have already charged you, if a debt is once barred by the statute of limitations, and afterwards renewed by giving a note or mortgage, the same may be enforced in law, if the transaction was free from fraud, as I have already charged you."

The jury found in favor of Mrs. Allen, that the mortgage was valid, and the execution should proceed; and thereupon Comer & Co. moved for a new trial, upon the following grounds, contained in the original motion:

- (1.) The verdict is contrary to law.
- (2.) The verdict is contrary to the evidence.

The motion was amended, and the following grounds approved as correct, taken in the amendment:

(1.) Because the court erred in this: The court, in enumerating the circumstances which the jury might consider in determining the *bona fides* of the transaction between said Mrs. Allen and her husband, G. D. Allen, omitted to state the failing condition of said Allen at the time of the giving of said mortgage, said fact being, as movants insist, a very important fact. The charge of the court on this point was as follows: "You might consider whether the debt claimed by Mrs. Allen was or was not barred by the statute of limitations at the time of giving the mortgage; you might consider whether the debt was evidenced by note, account or other writing; you might consider whether the mortgage was given as the result of an agreement between Mrs. Allen and her husband, or whether the same was given freely and voluntarily; you might consider whether or not the said mortgage included all the defendant's property or not; you might consider

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whether said mortgage was given to hinder or delay creditors, or whether the same was given fairly and in good faith; and from all these considerations and facts, and from all the facts and circumstances proved in the case, and find and determine whether or not the mortgage given was a fraud upon Comer & Co., as a creditor of G. D. Allen, and if so, you would find in favor of Comer & Co.”—And movants show that the court omitted to state the failing condition of Allen as a suspicious fact for them to consider, after he had been so requested to do, as will appear hereafter.

(2.) Because the court erred in charging the jury as follows, when so requested by counsel for Mrs. Allen: “If you believe from the evidence that the money received by Allen arose from the sale or use of Mrs. Allen’s property by her father after 1866, then the father of Mrs. Allen could not give the money to Mrs. Allen;”—said charge not being sustained by the evidence.

(3.) Because the court erred in this: Being requested by counsel for Comer & Co. to charge the jury as follows: “We request the court to charge the jury that transactions between husband and wife, by which the rights of creditors are affected, should be scanned by the jury closely, and the *bona fides* of the transaction clearly established. The law looks with stricter scrutiny on such transactions than it does on transactions between other persons. In considering the *bona fides* of the transaction, the jury may consider the facts, if such are the facts, that the debt was barred by the statute of limitations; the length of time the debt had been due; the fact as to whether a note or other evidence was given by the husband to the wife; that nothing was ever agreed to between the wife and husband as to the debt or the payment; that at the time of the giving of the note and mortgage, the wife was not present; that the terms of the note—when it should be due, how much it was for, how it was to be secured, were stated by her husband, who directed how the transaction should be consummated;

at no note was given the wife until the husband was in failing condition, of which fact the wife was informed at the time; also the fact that, at the time of giving the note, the husband executed a mortgage on his property, which covered all his property, and left nothing for his creditors; you may consider all these facts, if such are facts, in determining the *bona fides* of the transaction"—The court stated to the jury that he had been requested to charge as follows by the counsel for H. M. Comer & Co.: "The law looks with stricter scrutiny on such transactions than it does on such transactions between other persons. In considering the *bona fides* of the transaction, the jury may consider all the facts proved in the case."—Movants say that the court erred in stating that he had been so requested by the counsel for Comer & Co. to charge; and further, that he erred in changing, amending and reducing the request, and then giving it to the jury as he did, stating that it was the request of counsel for H. M. Comer & Co.

(4.) Because the court erred in not giving the request of counsel for H. M. Comer & Co., as set out in the third ground of this motion, entire and full as it was presented by said counsel.

(5.) Because the court erred in this: He was requested by counsel for H. M. Comer & Co. to charge as follows: "I charge you that an open account becomes barred within four years after the same becomes due; and if the debt held by Mrs. Allen against G. D. Allen was an open account, the same would become barred after the lapse of four years, and Allen would be under no legal liability to pay the claim, and if the same was sued for collection and the statute of limitations was pleaded, the same could not be collected." The court stated that he had been requested so to charge by the counsel for H. M. Comer & Co., and to the charge added the following qualification: "But, as I have already charged you, if a debt is barred by the statute of limitations, and afterwards renewed by giving a note or mortgage, the same may be enforced in law, if the

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transaction was free from fraud, as I have already charged you."—The court erred in adding this qualification to the request, after stating that it was the request of H. M. Comer & Co.

(6.) Because the court erred in not giving the request of the counsel for H. M. Comer & Co., as set forth in the fifth ground of this motion, without the qualification also set forth in said ground.

(7.) Because the court erred in refusing to charge the jury as follows, being so requested by the counsel for H. M. Comer & Co.: "That the giving of a note and mortgage by a husband to the wife in settlement of a barred debt, when the husband was in a failing condition, of which fact the wife was cognizant, and when said mortgage left nothing to the creditors, such a transaction is *prima facie* fraudulent as to creditors, though it may be good as between husband and wife, and the facts should be such as to rebut the presumption of fraud clearly, and show the *bona fides* of the transaction clearly."

(8.) Because the court erred in refusing to charge the jury as follows, when so requested by the counsel for H. M. Comer & Co.: "That the giving of a mortgage by a husband to his wife to secure a barred debt while the husband is in a failing condition, of which his wife is cognizant, when the mortgage thus given, if any such was given, left nothing for the creditors, is a fraud in law as to creditors, and will be set aside as to them, though good as to his wife."

(9.) Because the court erred in refusing to charge the jury, when so requested by the counsel for H. M. Comer & Co., as follows: "That an insolvent debtor cannot voluntarily, to the prejudice of his creditors, execute a mortgage on his property, to secure a debt to his wife barred by the statute of limitations."

This motion was refused, and this writ of error was filed to the refusal.

There was little conflict as to the main facts in evidence; the principal dispute was as to the conclusions to be drawn from the facts.

1. We think the case was fully and fairly submitted to the jury, under the view entertained by the court of the law applicable to the several issues made, and that the verdict of the jury, though not absolutely required, is sustained by the evidence. We are further of opinion that the charge, in the main, stated the law correctly, and in effect covered and fully met so much of the written requests of the plaintiff in error as should have been given to the jury.

2. As to her separate property, the wife is a *feme sole*. and may make her husband, like any other person, her creditor. Code, §1783. Every restriction the law places upon the disposition and use of her separate estate is imposed for her protection and benefit,—as, her inability to bind her property by a contract of suretyship, or to part with it to pay her husband's debts, or to sell and convey it to him or her trustee without the sanction and support of the superior court. Code, §§1783, 1785, 2337.

Prior to the passage of the act of 1866, whereby all the property at the time of the marriage, and all such as is given to, inherited and acquired by the wife during the coverture, is declared to be her separate property, to vest in and belong to her, and not to be liable for the payment of any debt, default, or contract of the husband, she had the power of disposing of her separate estate, as a necessary incident of the ownership of the property, and she might, by the terms of her ante-nuptial marriage settlement, entered into fairly and without fraud, make her husband her debtor. In the leading case of *Magniac vs. Thompson*, decided by the Supreme Court of the United States, 7 Peters, 348, it was declared "Upon principle and authority, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If

the settler alone intend a fraud, and the other party has no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with strong resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors.

“Fraud may be imputed to parties, either by direct co-operation in the original design, at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design, upon notice, into operation.

“Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his own wife.”

The marriage settlement was executed in this instance in 1825. Four years thereafter, on the eve of the husband's insolvency, and when judgments for large amounts were about to be entered against him, he transferred a large amount in notes to the trustee of his wife, as was alleged, in satisfaction of the obligation incurred by this settlement. The husband's creditors sought to reach these notes, and subject them to the payment of their debts, charging that the transfer was covinous and designed to benefit the husband and his family to their detriment. The circuit court directed the jury, that if it was done in order to comply, in part, with the agreement, it was not fraudulent. If it was colorable, made with the intention of covering and concealing so much under pretence of the marriage articles, for the husband's use, and so received by the trustee, it was legally fraudulent as to creditors; but if delivered with such intention and not so accepted, then the trustee might not only fairly apply it to the trust fund, but was bound so to do. Though it may have been done on the

ever of the judgment confessed, that would make no difference ; it being to carry into effect the marriage agreement of December, 1825.

The Supreme Court say of this part of the charge, " We cannot perceive any error " therein. " The wife became a purchaser and a creditor of her husband in virtue of the marriage articles ; and if the delivery of the notes was made in part performance of these articles, *bona fide*, and without fraud, it was a discharge of a moral as well as of a legal duty." 7 Pet., 348, 396. Substantially the same principles were upheld by this court in *Marshall vs. Morris*, 16 Ga., 368.

With the exception of the restrictions above mentioned, the wife sustains the same relation to property acquired under the act of 1866 as she does where the entire interest vests in her under a marriage settlement, and has over it the same powers and rights, and can subject it to the same liabilities. In the case at bar, the marriage took place prior to the act of 1866, but the property was not reduced into possession of the wife until afterward, and then, it is said, the husband did not take possession of it as his own estate, but as his wife's. This question, with all the others bearing upon the case, was submitted to the jury, and they were instructed to scrutinize closely every circumstance connected with these dealings between husband and wife, from their commencement to their termination. This was in exact accordance with the law as laid down by this court. In *Booker vs. Worrill*, 55 Ga., 332, it was decided that a husband may become indebted to the wife for the rents of her separate estate, and if such indebtedness is *bona fide*, it is a valuable consideration to support a deed from him to her ; that, in a contest between her, as claimant of the property thus conveyed, and the creditors of the husband, the questions as to the *bona fides* of the indebtedness, and fraud in the transactions, are for the jury, who should closely scan the same, and if found, upon such *evidence*, to be fraudulent, it should be set aside as against

the creditors; but if the debt should appear to be a real *bona fide* subsisting debt, and the conveyance was made to pay the same, then the transaction should be upheld.

"The husband's right to reduce the wife's property into possession, before the act of 1866," was held by this court in *Sperry & Niles vs. Haslem*, 57 Ga., 412, to be a vested right, and that after the act, if he reduced the same to possession as his own estate, it thereby became his property, and was subject to his debts; but if he reduced it to possession for her, and as her estate, after the passage of that act, and in consideration of having made use of it for his own purposes, conveyed to her a tract of land in lieu thereof, the title to the land vested in her, and his creditors could not subject the same to the payment of his debts. *Archer et al. vs. Guill*, 67 Ga., 195, is as much in point as the foregoing cases.

The only difference between those cases and this is, that the debt to the wife's claim here, at the time of executing the mortgage, was barred by the statute of limitations. This, it was contended, made the transaction *per se* fraudulent, but the court did not so think, and refused so to charge the jury. He did, however, instruct them that it was a circumstance to be considered in investigating the fairness of the transaction. This instruction was doubtless correct, unless, as contended by affiant's counsel, the debt was not a subsisting debt, and that the new promise rested upon nothing more than a moral consideration. Neither of these positions is, in our opinion, tenable. The statute of limitations does not extinguish the debt, it only bars the remedy. This the promisor may revive by written acknowledgment and promise to pay the same, either before or after the bar of the statute attaches. The statute in either case commences to run from the acknowledgment. Code, §1950, sub-sec. 6, §2934. That the consideration for this new promise is not merely a good consideration in contradistinction to one of value, is evident from the Code, §2936, which in express terms declares that "a new promise

revives or extends the original liability· it does not create a new one." It is doubtless upon this principle that an administrator is justified, by a like express enactment, in relieving a debt of his intestate, barred after his death, from the operation of the statute, and unless it is made to appear that the claim was in reality unjust, he is discharged from liability to the distributees. Code, §2541.

The fact that the debtor was in failing circumstances did not, as we have seen, prevent his honestly preferring one of his creditors. (Code, §1953); and it can make no difference, as we have likewise seen, that the preferred creditor is the debtor's own wife. At the time this mortgage to the wife was executed, it was denied that the debtor was insolvent, and this, among other issues, was submitted to, and found by, the jury. It is also evident, from the testimony of Cabaniss and Allen, that when Comer & Co. took the mortgage on which they rely in this suit, they had notice of Mrs. Allen's mortgage; in fact, the mortgage itself recites prior incumbrances upon the property, amounting to \$5,200, and these witnesses swear that Mrs. Allen's mortgage went into that thus recited, to make up the amount, and that Comer & Company's agent had notice thereof. While we are inclined to think that these facts may preclude Comer & Co. from denying the validity of Mrs. Allen's mortgage, (*Long et al. vs. Bullard*, 59 Ga., 355), yet as the decision of the question is not indispensable to the final disposition of this case, we do not determine it. It was, however, cogent evidence, in connection with other circumstances, of the openness and fairness of these dealings between husband and wife, and was doubtless so treated by the jury.

There was no error in refusing such portion of affiants' requests to charge as were rejected by the court; they summed up only such facts in evidence as were favorable to affiants' view, while they omitted all mention or allusion to such as tended to elucidate and sustain the view of the opposite party.

FARMER vs. WORD.

We do not perceive how the affiants were injured by the statement of the court that the portions of these requests submitted were given at their request. If the entire charge requested was not proper, it might have been declined altogether, and in view of the objection here urged, this would perhaps have been the better course.

Judgment affirmed.

FARMER vs. WORD.

S. contracted to sell to McF. a tract of land, gave him a bond for title, and took his notes. McF. contracted to sell the land to F., and in turn, gave him a bond for title, and took his notes. One of these notes was transferred to W. Subsequently, McF. having only paid S. a small part of the interest that had accrued on the notes given by him, canceled the contract made with S., delivered up the bond for titles, and received his notes. It does not appear that F. had any connection with this cancellation, or knew that his note had been transferred. Subsequently to this, S. contracted to sell the land to F., made a bond for title to him, and received notes from him. Having paid to S. a part of the purchase money, F. took a homestead on his interest in the land. W. sued on the note of F. held by him, obtained a judgment, and levied on the land:

Held, that such debt was not for purchase money, so as to subject the land. When McF. sold to F., he had no title, but only an imperfect equity; this ceased upon the cancellation of the trade with S., and the subsequent sale by S. to F. did not make the note of F. to McF. a debt for purchase money.

September 11, 1883.

Homestead. Title. Contracts. Before Judge HUTCHINS. Franklin Superior Court. April Term, 1883.

Reported in the decision.

J. B. PARKS; A. S. ERWIN, for plaintiff in error.

W. R. LITTLE; W. I. PIKE, for defendant.

Farmer vs. Word.

HALL, Justice.

Sewell contracted with McFarland to sell him a certain tract of land, taking his notes therefor, and making him the usual bond to convey upon payment of the notes. Thereafter, McFarland contracted to sell the same land to Farmer, and took from him his notes, and made to him a bond to make title upon payment of his notes. One of these notes for \$500.00 was transferred, before due, for value, and without notice of any defence, to Word. Word brought suit on this note, and obtained judgment against Farmer, who made no defence to the suit. McFarland did not assign Sewell's bond to Farmer, but kept possession of the same; and after the transfer of Farmer's note to Word, he canceled the contract for the sale of the land with Sewell, received his notes to Sewell, and delivered him his bond to make title to the land, never having paid Sewell anything except a small part of the interest that had accrued on the notes given for the purchase money. It does not appear that Farmer had anything to do with the canceling of this trade; but after its cancellation, he contracted with Sewell for the purchase of the same land, giving him his notes for the purchase money, and taking his bond for the conveyance of the same, when the notes were paid. From the agreed statement of facts in the case, it does not appear that Farmer, at the time of this contract with Sewell, knew anything of the transfer of the notes, given by him to McFarland, to Word. Having paid Sewell a part of the purchase money, he laid a homestead upon his interest in the land so purchased, as last aforesaid, for the benefit of his wife and minor children, under the constitution and laws of the state. Word levied the *fi. fa.* issuing upon the judgment in his favor upon the land so set apart as a homestead; and to this *fi. fa.* Farmer interposed his affidavit of illegality, among others, upon the ground that the land levied upon had been set apart as a homestead, and was not subject to sale under the levy.

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The lower court, who tried this issue, by consent of counsel, without a jury, held the land subject, notwithstanding the homestead, solely upon the ground that the note, the foundation of Word's judgment, was given for the purchase money of the land, overruled the affidavit of illegality, and ordered the levy to proceed. To this decision Farmer excepted; and the point presented for our decision is whether the note given by Farmer to McFarland was any part of the purchase money of the land.

By Art. ix., §2, paragraph 1, of the constitution of 1877, Code §5211, the homestead set apart thereunder is, among other things, subject to levy and sale for the purchase money of the same; as it is likewise "for the removal of incumbrances thereon."

In our view of this case, Farmer purchased from McFarland nothing but the right of the latter to have a conveyance to the land in question, when McFarland should entitle himself to such conveyance by complying with the conditions of the contract with Sewell, which he never did. Farmer's contract with him could have been only for a bare right or imperfect equity. McFarland had no title to the land; he had nothing but the naked possession, coupled with this right or equity. The possession was all he could transfer, which was subject to be terminated, whenever the condition upon which it was held was broken. McFarland never had any lien upon this land for the amount of this note; it was not encumbered with the payment of the purchase money. Sewell held this lien and incumbrance; his title to the land was his security for the purchase money, and Word was not the assignee of Sewell, but of the man who owed him this obligation. Neither McFarland nor Farmer could have claimed this exemption against Sewell, and certainly Word, who was the mere transferee of whatever right McFarland had, could not do so.

When McFarland failed to comply with his contract, Sewell had the right either to enforce it by law, or to can-

cel it by an arrangement with the opposite party; and when it had been thus canceled, he held his title unfettered from any obligation to convey to McFarland, or any one claiming under him, either directly or indirectly. He had the perfect right then to sell to whomsoever he pleased, and why not sell to Farmer as well as a person who had never had any connection with the property? The question here is not whether Farmer's property outside of this homestead is subject to this judgment, but whether this homestead, based upon an equity to have a title upon compliance with his contract with Sewell, from and through whom he derives this right, is so subject. If he had purchased the right from any third person, it certainly would not be contended that it would be subject. How, then, could the fact that McFarland, to whom this note was given, on account of his casual connection with the property, be said to have an incumbrance or lien for the purchase money? We think it is only the legal owner of the property, or one who has a perfect equity to it, or his assignee, that can levy on or sell a homestead upon it for the unpaid purchase money. Were it otherwise, any number of assignees of bonds for titles, together with the transferees of the securities taken upon a sale of the bare right to have it conveyed, might with equal propriety insist upon such a claim.

It follows, from these views, that the decision of the court below was erroneous; that the execution in question was not founded on a judgment given for the purchase money of the homestead; that the right to the land upon which the homestead was taken was never in McFarland, and that Farmer does not hold under him, but under Sewell.

Judgment reversed.

Miller, trustee, vs. McDonald et al.

MILLER, trustee, vs. McDONALD et al.

1. However just or proper it may otherwise have been to grant an injunction, if done without having necessary parties before the court, it was error. Therefore, where one of two defendants to a bill in equity prayed an injunction against complainant, and subsequently died, and his death was stated, and an amendment made alleging its consequences, it was error for the court to grant an injunction without making his representative a party.
- (a.) The death of a mortgagor revokes a power in the mortgage authorizing a sale to reimburse the mortgagee.
- (b.) If dower and year's support be claimed by the widow and family of the decedent, they will be preferred to the mortgage of the creditor in this case; and if the complainant's deed was procured by false and fraudulent representations about his book, its value, and his having a copyright, and the decedent was cheated and defrauded, complainant has no title at all.
- (c.) The judgment is reversed, and the case remanded, with directions that parties be made and the rights of all be determined.

September 10, 1883.

Parties. Injunction. Dower. Year's Support. Equity. Mortgage. Practice in Supreme Court. Before Judge BOWER. Calhoun County. At Chambers. May 2, 1883.

J. H. Miller, as trustee for his wife and her children, filed his bill against D. W. Holloway and James J. McDonald, alleging, in brief, as follows: In 1880, Holloway sold to complainant a tract of land containing one hundred acres. Holloway was to give him possession on January 1, 1881, but when that time arrived, refused to do so. Complainant proceeded against him as a tenant holding over, but was met by a counter-affidavit, and the proceeding is still pending in court. After his purchase, he learned that McDonald had a mortgage on the entire tract, containing two hundred and three acres, of which that sold to complainant formed a part. The mortgage is nominally for \$532.00, but after eliminating usurious interest and entering proper credits for payments which had been made, there remains due \$281.00. The land other than

Miller, trustee, vs. McDonald et al.

that claimed by complainant is amply sufficient to pay the mortgage; but McDonald, under a power of sale in said mortgage, is proceeding to sell the entire tract.

The mortgage covered the tract of land and certain personalty, and contained the following power of sale:

"I do hereby appoint and constitute J. J. McDonald and his assigns, of said county, my true and lawful attorney in fact, for me and in my name (in the event of failure on my part to promptly meet and pay off said notes), to receive and take possession of said above described property, and after advertising the same for the space of thirty days in some public gazette, to dispose of the same at the court-house in the town of Morgan, Calhoun county, to make good and sufficient titles and conveyance to said property, and with the proceeds of sale to fully pay off and discharge said note with all expenses, and to return the remainder to me or my assigns; and I hereby fully authorize my attorney to do and perform all acts that may be necessary to fully accomplish the object herein intended; I hereby ratifying and agreeing to the same in as full and free a manner as if I myself had been present doing the same."

A combination between the two defendants for the purpose of defeating the recovery of the land by complainant is charged. The prayer was for discovery, injunction to restrain McDonald from selling the land under the mortgage, and both of defendants from combining to complicate the same, and for general relief.

Holloway answered the bill, admitting the sale to complainant and the making of the deed to him; but asserted, by way of cross-bill, that the deed was obtained by fraud, the consideration being a one-half interest in a certain arithmetic, of which complainant claimed to be the author, and concerning which he made various representations, including the statement that he owned the copyright. These representations were false; complainant did not have a copyright for the book, but it was an infringement of the copyright of another person. He prayed a cancellation of the deed, and injunction against the complainant to restrain the prosecution of his suit, and for general relief.

McDonald answered, denying usury or the existence of

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payments which had not been credited. He insisted that it would take all, or about all, of the land to pay the mortgage, and that he had a right to sell under the power contained therein.

Before the hearing of the application for injunction, Holloway died. Complainant thereupon amended the bill, alleging his death, and insisting that this worked a revocation of the power of sale contained in the mortgage to McDonald.

On the hearing, the bill, answers and various affidavits were introduced. The chancellor refused the injunction prayed for by complainant, but granted an injunction against him, restraining him from selling, disposing of or encumbering the property. He excepted.

C. B. WOOTEN, for plaintiff in error.

J. J. BECK, by A. HOOD, Jr., for defendants.

JACKSON, Chief Justice.

The plaintiff in error filed a bill to enjoin McDonald, one of the defendants, from selling under his mortgage on the property of Holloway, the other defendant, on the ground that the complainant held title to a portion of the property mortgaged, and on the further ground, by amendment, that Holloway was dead, and thereby the power to sell under the mortgage was revoked. Holloway, before his death, set up in his answer certain allegations of fraud in the procurement of his deed against complainant, and prayed an injunction against him from interference with his, Holloway's, property.

The record nowhere discloses the fact that any party had been made, either executor or administrator, to represent Holloway, though by order of court the amendment was made alleging his death and the legal consequence thereof—the revocation of the power to sell. Yet the chancellor granted the prayer of Holloway to restrain

complainant from all interference with the property, when he was dead, and no parties made.

1. Of course this was error, for the reason of want of parties, however little merit there was in complainant's case, and however just the judgment of the chancellor may otherwise have been.

2. The chancellor also denied the prayer of the complainant to restrain McDonald from selling under the power in the mortgage after the amendment suggesting Holloway's death. That death revoked the power to sell under the ruling by this court in the case of *Lathrop & Co. vs. Brown, executor*, 65 Ga., 312.

But that ruling goes further, and expressly denies that a year's support of the family of the decedent would be preferred to the mortgage creditor, as also would the widow's right to dower. Hence the necessity of making the representative of Holloway's estate a party, as well as the widow of Holloway.

The judgment is therefore reversed, and it is ordered that the case be remanded, with directions that Holloway's representative and his widow be made parties, and that McDonald, having been drawn into equity, may proceed by decree to foreclose his mortgage, unless the representative of Holloway and his widow set up adverse claims which absorb the entire estate, and unless the complainant be able to show clear title, unaffected with fraudulent procurement thereof, to a portion of the land; that all parties litigate *inter sese* their respective claims, and be enjoined from altering the present status of the property and estate of the decedent, Holloway, until the final decree thereon.

And in order to facilitate the final settlement of the issues which may be made, this court holds and expresses its opinion that, if dower and a year's support be claimed by the widow and family, they will be preferred to the mortgage creditor, and if the complainant's deed was procured by false and fraudulent representations about the land and its value, and the statement that he had a c

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right thereto when he has none, and thus cheated and defrauded the decedent, then he had no title at all, and can interfere neither with McDonald nor the representative of Holloway, his widow and the family.

Judgment reversed.

THE ROSWELL MANUFACTURING COMPANY vs. HUDSON,
WATSON & COMPANY.

1. Where no time was specified for payment in a draft, it was not due until presented.
 - (a.) Such a draft being payable to order, and therefore negotiable, one who bought it before presentation, took it before due; and the presumption is that he is a *bona fide* holder.
 - (b.) Where a single draft payable to order was issued, with no mention of duplicate or second draft contained in it, one who purchased before due was an innocent holder, so far as the face of the paper is concerned, and will be protected, although another draft for the same consideration and to the same effect was afterwards issued by the drawer and paid, by the fraud of the payee. The second draft was not a duplicate or second of the other, in the sense of the commercial law touching foreign bills of exchange.
2. Any circumstances which would put a prudent man upon his guard in purchasing negotiable paper, will be sufficient to constitute notice to a purchaser of such paper before due.
 - (a.) No fixed time for diligence in such cases can be laid down, but each must depend on its own facts, to be ascertained by the jury, under the charge of the court.

September 11, 1883.

Negotiable Instruments. Promissory Notes. Drafts. Contracts. Notice. Before Judge FAIN. Cobb Superior Court. November Term, 1882.

Reported in the decision.

CANDLER & THOMSON, for plaintiff in error.

JACKSON & KING, for defendants.

The Roswell Manufacturing Company vs. Hudson, Watson & Company.

JACKSON, Chief Justice.

The defendants in error, as holders of a negotiable paper, sued the plaintiff in error, as drawer thereof, and the case being tried by consent before the judge without a jury, recovered a judgment thereon. That judgment is assigned for error here.

The paper sued on is as follows:

* \$300.00.

OFFICE OF ROSWELL MANUFACTURING CO.,
ROSWELL, GA., 24th November, 1880.

Pay to the order of A. A. Porter three hundred dollars, value received, and charge the same to account of

To Larned, Haas & Handy, 232 Chestnut street, Philadelphia, Pa.	} ROSWELL MANUFACTURING CO., Jas. W. Robertson, Pres."
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It was indorsed by A. A. Porter.

1. No time is specified for the payment. Therefore it was not due until presented; by our Code, section 2791. It had not been presented when the holder bought it; therefore, he bought it before due. Therefore, the presumption is that he is a *bona fide* holder. Code, §2787.

But the plaintiff in error says that the payee induced it to issue another paper like this to him for the same consideration, which was presented and paid by the drawee before the paper sued on was presented, and thereby it, as maker or drawer, was discharged from paying this paper.

The evidence is that the duplicate, as it is termed, was drawn on the 24th of December, 1880, and was paid by the drawees on the 7th of January, 1881. On the 1st of January, 1881, the holders were informed by the payee that such a draft or order as the first, that of November 24th, 1880, had been sent him, and he was expecting it, it being on the way. On the 18th of February, 1881, they were informed by the payee that he had heard of the draft, which had gone to Bennett, Texas, instead of Burnett, Texas, where the holders and payee resided, and had been opened there by another man of his surname, and showed them a letter from him to that effect. Whereupon they

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loaned him fifteen dollars on the faith of the paper, and on the 3d of March, 1881, when the paper came from Bennett to Burnett, they cashed it in full, and on presenting it in Philadelphia, it was not paid, because that drawn on the 24th of December had been paid.

In the sense of the commercial law touching foreign bills of exchange, the paper which was paid was not a duplicate or second of the other. It was not drawn and issued at the same time, nor was there any mention of the fact of any second or third duplicate being then issued on the face of the paper sued on, so as to notify the commercial world of such others being in existence, and thus to put a purchaser on notice. 1 Daniel on Neg. Inst., pp. 88, 89, 90; 1 Parsons Notes and Bills, pp. 58-9, etc.

Therefore, these holders had no notice of the existence of a second or third, the payment of which would discharge this order they were buying. None such was in existence according to commercial usage; and none such was alluded to on the face of the paper they bought. So that, in law, and so far as the face of this paper disclosed anything to them, they are still innocent holders, though another paper for the same consideration and to the same effect was afterwards issued to the drawer, and paid, and all by the fraud of the payee.

2. Did any facts outside of the paper they bought put them upon inquiry, so as to change their character of *bona fide* holders?

Our Code declares that "any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." Code, §2790.

But two circumstances are disclosed in this record and insisted on here, when the facts and positions of the plaintiffs in error are analyzed. The first is that they would not credit the payee without security, and the second, that the time which elapsed from the making of the paper to their

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purchase of it was so long as to put them on inquiry, as prudent men.

Their not crediting the payee, and doling out to him only \$15.00 on a paper on its way to him, and which by mistake was delayed, we think, shows prudence and caution. When they paid cash for all on its face afterwards, it had come, and looked right on its face, and they had knowledge from the letter which the payee received from Bennett, as well as from what he said, that a misdirection had sent it to the wrong post-office, and all the delay was explained. So the judge below, sitting as jury and judge both, adjudged and found; and as the law is that no fixed time for diligence in such cases can be laid down, but each must depend on its own facts, to be ascertained by the jury under the charge of the court, we cannot say that the judge erred, as jury on the facts, or as judge in instructing himself in his other character as to the law thereon. 1 Parsons on Notes and Bills, pp. 263, 268-9, and notes.

The presumption being that the holder is innocent, the fact being that the drawer issued the second paper, and thus put it in the power of the payee to defraud the public in its own negotiable paper, and therefore, though innocent of intention to do wrong, enabled another to do it by its sheer carelessness, and thus to put the paper on the holders, we are quite clear that the judgment is right, and that the drawer must pay the draft.

If the holders had been put on notice, or if such facts had been proved as would have put them, as prudent men of business, on notice, then they would stand in the shoes of the fraudulent payee, and could not recover; but as the facts do not rebut, but confirm, the presumption that they are innocent holders of the paper before due and for value, we affirm the judgment.

Judgment affirmed.

Jackson, *alias* Lyles, vs. The State of Georgia.

JACKSON, *alias* LYLES, vs. THE STATE OF GEORGIA.

1. An immaterial alteration in a paper, whereby no damage would accrue to any person, would not constitute the crime of forgery. The alteration would be entirely harmless, and the law presumes, under such circumstances, that the act was not done with intent to harm any one.
- (a.) Therefore, where an order requested the drawee to pay for fifty-four pounds of lint cotton at eight and one-half cents per pound. and on the margin of the order were written the figures "54 lbs.," and the only charge in the indictment was that the figure 3 had been inserted before this marginal number, so that it should read "354 lbs.," such alteration did not change the value of the order, and could not injure any one; and the indictment was demurrable.
2. This court will take judicial notice of the names of all companies chartered by the legislature. Where an indictment charged that an order, directed to the treasurer of the "Eagle and Phoenix Manufacturing Columbus," was in the county of Muscogee altered, etc.; it was fatally defective, because there is no such company.

October 9, 1883.

Criminal Law. Indictment. Before Judge WILLIS.
Muscogee Superior Court. November Adjourned Term,
1882.

Reported in the decision.

C. J. THORNTON, for plaintiff in error.

T. W. GRIMES, solicitor general, by J. M. McNEILL, for
the state.

BLANDFORD, Justice.

The following bill of indictment was preferred against
the plaintiff in error:

"The grand jurors * * * charge and accuse Peter Lyles, *alias* John Jackson, * * with the offence of forgery, for that the said Peter Lyles, *alias* John Jackson, on the 23d day of November, 1882, in the county aforesaid, then and there unlawfully, and with force and arms, falsely and fraudulently did alter and change and raise the following genuine order for money, to-wit:

Jackson, alias Lyles vs. The State of Georgia.

"54 lbs.

"G. Gunby Jordan, treas.:

"Pay John Jackson for fifty-four lbs. of lint cotton at $8\frac{1}{2}$ per lb.
To H.

Columbus, Ga., Nov. 23, 1882.

Ginned remnant samples.

E. L. DAVIDSON,
For the Company.'

"The same being then and there an order on the Eagle & Phenix
Manufacturing Columbus, and G. Gunby Jordan being the treasurer
thereof, and the said E. L. Davidson being in the employ of said com-
pany, so as to read,

"354 lbs.

"G. Gunby Jordan, treas.,

"Pay John Jackson for fifty-four lbs. of lint cotton, at $8\frac{1}{2}$ per lb.
To H.

Columbus, Ga., Nov. 23, 1882.

Ginned remnant samples.

E. L. DAVIDSON,
For the Company.'

"With intent to defraud the said Eagle and Phenix Manufacturing
Company, contrary," etc.

To this bill of indictment the defendant demurred, and moved to quash the same before arraignment, which demurrer and motion the court overruled, and defendant excepted, and this is assigned as error.

1. The only alteration of the paper or raising of the same shown in the indictment is that the number 54 in the margin was altered or raised to 354, by placing the figure 3 before the number 54. The body of the order remained the same, and was not altered in any particular. The placing the figure 3 before the number 54, so as to make the same read 354 lbs., in nowise altered the value of the order; it could not possibly have damaged the company; and it is well settled that an immaterial alteration of a paper such as this, whereby no damage would accrue to any person, would not constitute the crime of forgery. The alteration was entirely harmless, and the law presumes, under such circumstances, that the act was done with no intent to harm any one. Wharton's Am. Crim. Law, 2 vol., 308; 2 Bishop Crim. Proc. 169, and cases therein cited.

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2. Again, the indictment is defective, because it charges that the order altered was directed to G. Gunby Jordan, treasurer of the Eagle and Phenix Manufacturing Columbus. There is no such company, and this court will take judicial notice of the names of all companies chartered by the legislature,—this being the Eagle and Phenix Manufacturing Company. So the court should have sustained the demurrer and quashed said indictment. The judgment is therefore, and on that account, reversed.

Judgment reversed.

HEAD *vs.* BRIDGES *et al.*

1. A sheriff may serve copies of a bill of exceptions on the defendants in error, and his official entry on the bill of exceptions is sufficient evidence of service. Nor does it make any difference whether such service and entry be made before or after filing. Official service by the sheriff stands on a different plane from that by counsel or a party.
- (a.) As to service in other counties, it is unnecessary to decide, as it does not arise in this case.
2. If the chancellor puts his refusal of an injunction on the facts which were controverted, or refuses an injunction generally, this court will not reverse the judgment, unless it be made to appear that the discretion of the chancellor has been abused; but where the chancellor rested his judgment on the existence of a common law remedy in another county, and the want of jurisdiction in the superior court of the county where the bill was filed, and such grounds were erroneous, a reversal will be granted.
- (a.) The bill charged, and the facts, from complainant's side, were, in brief, as follows: Complainant was called to account as executor by the legatees of the estate before the court of ordinary of Jasper county; the case was transferred by appeal to the superior court, was brought by exception to the Supreme Court, and a new trial was granted; pending the case so returned, this bill was filed. It rested upon the equity, that complainant had in good faith applied for his discharge as co-executor with the mother of the legatees; that he obtained, as he thought, a valid discharge; that though this discharge was held to be invalid because this citation appeared not to be in time, yet to show good faith on his part, he alleges that it has been found that service of the citation was actually made in time; that when thus discharged, as he *bona fide* thought,

the administration was turned over to his co-executrix, who was guilty of all, or most, of the mal-administration after his retirement; that he is entitled to contribution from her, and to subject her share of the estate; that she has colluded with her children to put the whole burden on him; that all parties reside in Monroe county:

Beld, that there is equity in the bill, and the superior court of Monroe county has jurisdiction to grant relief.

(b.) The judgment is reversed, with directions that the injunction prayed for be granted, the bill be reinstated (if dismissed), and proceed to trial on the merits, provided that complainant shall give ample bond and security to respond to the legatees for such decree as they may eventually recover against him, if any.

(c.) The bill may be amended as may be necessary to a full adjudication of the rights of all parties, and in such manner as not to collide with the other bill pending in the court.

October 16, 1883.

Practice in Supreme Court. Injunction. Equity. Administrators and Executors. Jurisdiction. Before Judge STEWART. Monroe County. At Chambers. November 29, 1882.

The facts are set out in the second head-note and the decision.

A. D. HAMMOND; W. A. LOFTON; JOHN I. HALL, for plaintiff in error.

BERNER & TURNER ; J. H. LUMPKIN, for defendants.

JACKSON, Chief Justice.

1. A motion was made to dismiss this writ of error, on the ground that the bill of exceptions was not served until after it had been filed in the clerk's office. It was served by the sheriff, the regular officer of the superior court to serve copies of such papers as are entrusted to him for service by courts of record of this state. Code, §361. His service of copies of bills of exception has been recognized as valid by this court, and his return of such service, entered on the original bill of exceptions, need not be under

oath; thereby recognizing his official oath to bind him. 4 Ga., 682; 50 Ib., 369.

These decisions recognize the superiority of the service of the sheriff over that of the party or his counsel, because it is official. The party must verify his service of a copy by his oath; the counsel his in the same way by oath; because they have never taken an official oath which covers the service of either, and because they are interested. Thus the official oath of the sheriff is that under which he makes the return, and what is that oath? It is to execute all writs, etc., "and in all things well and truly, without malice or partiality, perform the duties of the office of sheriff," etc. Code, §348. Therefore, one of those duties is to serve copies of bills of exceptions, when placed in his hands therefor. Does it make any difference, if it be served within the time fixed by law, whether the sheriff, whose official duty under oath is to serve it, as held by this court, serve before or after filing? None that we can see.

The reason on which the decisions that the counsel cannot serve after filing, or the party either, is that neither can be safely entrusted with the original after filing, lest they might alter it, but the sheriff is no more likely to alter the bill of exceptions than any other writ or process which he is required to serve; and as the cases cited make it his duty to serve these copies under his official oath, we do not see any reason why he should not be entrusted with the original to make the entry thereon, there being no more danger of his altering this original than another.

The argument *ab inconvenienti* in regard to service in other counties, the lack of any law for second originals, the necessary use, therefore, of the original bill to make the return upon, does not apply to this case, all the defendants being residents of the county of Monroe. In such a case, however, the plaintiff in error would be compelled to start in time with his copies for the different counties, and even then would find much trouble and delay, if there were many counties in which to have the copies served;

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and therefore, he would probably serve, himself, or by his counsel, and upon the counsel of the other side. But sufficient unto the day is the evil thereof. No second original is needed here; no necessity exists to take the original bill of exceptions out of the county, or of the court-house, and the evils and troubles suggested do not exist here.

The motion to dismiss the writ of error is denied.

2. Is there equity in the bill, and should the injunction have been granted?

The bill charges, and the facts, from complainant's side, show that the complainant was called to account by the legatees, before the ordinary of Jasper county; that the case was transferred, by appeal, to the superior court; thence brought to this court by him, and a new trial awarded. Pending this case, so returned for a new trial, the bill before us was filed, and was predicated upon the broad equity that complainant had, in good faith, applied for his discharge as co executor with the mother of defendants; that he obtained, as he thought, a valid discharge; and though held invalid by this court, when the case was here from the Jasper appeal trial, because it appeared on the face of the record of that discharge that the citation was not in time, yet to show the bona fides of his contract, he alleges that the parties were served in time, and proves the fact by depositions thereof by the ordinary, and others; that when thus discharged, as he honestly thought, the administration was turned over by him to the co-executrix; that she was guilty of all the mal-administration, or most of it, at least, after his retirement therefrom, and that, therefore, he is entitled to a decree against her, and to subject her share of the estate of testator to such just contribution as equity will cause her to make to him; that she has colluded with her children to put the whole burden on him, notwithstanding she is really the guilty party, and the mismanagement occurred after his virtual resignation of the trust; and several circumstances, such as her failure to assist in the defence, though both were cited, the

attempt to sell the lands of the estate, her failure to consult, her refusal to participate in counsel, or talk with his counsel, and other circumstances are adduced to show this collusion; that he can get no decree against her for contribution in Jasper, but only in Monroe, as she resides in Monroe, and therefore Monroe county has jurisdiction of the case, so far as relief to him is concerned, against her, and her children also are in that county, and none resident in Jasper.

The chancellor refused the injunction. Had he put the refusal on the facts which were controverted by the other side, or had he put it generally, this court, under the long current of its decisions, would not have reversed the judgment, unless, on a close and critical examination of the bill and answers and depositions *pro* and *con*, it were made to appear that the discretion vested in the chancellor had been abused. But the chancellor rests his judgment on the common law remedy in Jasper, and the want of jurisdiction in the superior court of Monroe county. That is the only county which has jurisdiction, if substantial relief be prayed for against the co-executrix, for that is the county of her residence, and no defendant to the bill resides in Jasper. Neither the common law case in Jasper, nor equity proceedings in connection with, or ancillary to, the cause pending there, would avail complainant, for want of jurisdiction there for that purpose. We are clear, therefore, that the chancellor erred in refusing the injunction on that ground.

And inasmuch as there is equity in the bill, and the facts of record here, however stubbornly contested, appear to us to require a trial before the jury to settle all the equities between these parties, where all the facts can be more thoroughly sifted and the truth elicited, the judgment is reversed, and the chancellor is directed to grant the injunction, to reinstate the bill if dismissed, and proceed to the trial thereof on the merits, provided that complainant shall give ample bond and security to respond to

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the legatees for such decree as they may eventually recover, if any, against him. 54 *Ga.*, 378-9; 63 *Ib.*, 438; 67 *Ib.*, 215; 29 *Ib.*, 34.

When the bill shall thus be before the court for trial, it may be so amended as may be necessary to a full adjudication of the rights of all parties, and in such manner as not to collide with the other bill pending in court. Equity is ever liberal in allowing amendments, in order to reach the real justice due to parties.

Judgment reversed, with directions indicated above.

SCOTT, HORTON & COMPANY vs. RUSSELL.

1. Immature crops cannot be levied on separately from the land on which they are growing, except where the debtor absconds or removes from the county or state. Such grounds for levying on growing crops, if they exist, should appear in the process or the levy; otherwise, the levy will be void.
2. Where a distress warrant alleged that the debt was past due, and the defendant was removing the rents and crops from the rented premises, but the plaintiff's evidence showed that the debt was not due, the proceedings should have been dismissed. Such process is in derogation of common law and common right, and the statute giving it must be strictly construed and literally pursued. Errors or omissions cannot be corrected by amendment or supplied by evidence.
 - (a.) Whether the warrant was void. *Quære?*
3. Property distrained for rent may be claimed as in other cases, and the claimant may avail himself of any objection to the process that the defendant could have urged.

November 13, 1883.

Distress Warrant. Landlord and Tenant. Crops. Levy and Sale. Claim. Before Judge STEWART. Floyd Superior Court. September Adjourned Term, 1882.

Reported in the decision.

E. J. KIKER & SON, for plaintiffs in error.

T. W. MILNER; DABNEY & FOUCHE. for defendant.

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HALL, Justice.

The plaintiff sued out a distress warrant to collect seventy-five dollars for rent, claimed to be "past due," charging that the defendant was seeking "to remove the rents and crops of the land rented to him from the premises." This warrant, which issued on the 6th day of September, 1881, was, on the same day, levied on "the entire corn, cotton and sorghum crop growing" on the land in question. After the levy was made, the property was claimed by Scott, Horton & Co., and the claim was returned to the justice's court, where, on the trial, the levy was dismissed, and an appeal was taken to the superior court. Upon the trial in that court, the plaintiff moved to dismiss the levy, because it appeared that the same was made without authority of law, it being alleged in the affidavit to obtain the warrant that the rent was past due, and the defendant was seeking to remove the rents and crops from the premises; and further, that the levy was upon a growing crop, and there were no facts set forth which would authorize such a levy. This motion was overruled, and the property found subject. The evidence in the case established the fact that the rent for which the process issued was not due until the 15th day of November thereafter; and that the claimants purchased the growing crop on the land without any notice that there was a claim on it for rent, in July, before the warrant was sued out; it also appeared that the plaintiff was the father-in-law of the defendant. Upon the return of this verdict, a motion was made for a new trial upon various grounds, which was refused. We are satisfied that the new trial should have been granted, upon several of the grounds taken in the motion.

1. The levy should have been dismissed, because it was made, as appears from the entry of the levying officer, upon a growing crop; it was not made on the land on which the crop was growing, and did not purpose to bring that to

sale. It was not shown, at least at this stage of the trial, although it was afterwards attempted, that the crop was matured and fit to be gathered, or that the defendant absconded, or had removed from the county or state. In either one of these events, the immature crop could have been levied upon and brought to sale. Code, §3642. By a general rule, there must be an actual or constructive seizure of the personal property levied on (*Id.*, §2526); hence a future interest in such property cannot be seized and sold; but the liens of judgments attach thereto, so far as to prevent alienation, before the right of present possession accrues. *Id.* Immature crops, which cannot be removed from the land on which they are growing, are incapable of seizure; the party in possession of the land cannot be removed therefrom, unless it is sold. If he absconds, or has removed from the county or state, he has, in either case, voluntarily abandoned the possession, and in each case the officer may enter and take the custody of the crop. These facts must appear, however, either in the process itself or in the levy; otherwise, in their absence, it would be void, and in this case should have been dismissed.

2. Under the facts of this case, it is unnecessary to determine whether the warrant itself was void, because it asserted on its face that the debt was past due, and that the defendant was removing the rents and crops of the land rented from the premises (Code, §§1977, 2285), or whether a demand for the debt or an excuse for not making the demand should have been set forth in the proceeding. Code, §1991. When the plaintiff showed by his testimony, in contradiction of the statement in the warrant and the affidavit on which it issued, that the debt, instead of being past due, was to become due at a future day, the whole proceeding should have been set aside. Such process is in derogation both of common right and common law, and the statute giving it must be strictly construed and literally pursued. If there is error in it, such error cannot be corrected, either by amendment or

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testimony, nor can any omission be supplied by evidence, as was done in this case.

3. It only remains to add that property distrained may be claimed by a third person, upon making oath and giving bond, as in other cases of claims,—which claim, when made, is to be returned and tried, as provided by law for the trial of the right of property levied on by execution. Code, §4084.

That the claimant may avail himself of any objection to the process that the defendant could have urged, is too well settled to admit of question. The levy, in this instance, upon its face was void; and if the process upon which it was entered was not also void on its face, it was rendered so by the plaintiff's proof in the case, and should, on motion of the defendant, have been quashed. This disposes of the case, and renders unnecessary the consideration of any of the other questions which record makes Judgment reversed.

THURMAN, administrator, vs. PETTITT.

Where a carpenter built a store-house under a contract with the owner of real estate, he occupied the position both of a contractor and of a mechanic, and in either capacity, or in both, he had a right to a lien, under §1979 of the Code.

(a.) This case differs from 56 Ga., 68.

November 2), 1883.

Contractor. Mechanic. Liens. Before Judge FAIN.
Dade Superior Court. March Term, 1883.

Reported in the decision.

GRAHAM & GRAHAM, for plaintiff in error.

W. N. JACOWAY; T. J. LUMPKIN; R. J. McCAMY, for defendant.

Kennedy vs. Lee.

HALL, Justice.

The plaintiff, who is a carpenter, built a store-house for defendant's intestate, in pursuance of a contract entered into between them. Within thirty days after the completion of his work, he recorded a lien, as contractor, upon the premises thus improved. This suit was brought to recover a balance due for the work, and to enforce the lien thus recorded. On the trial, it was objected that the plaintiff, being a mechanic, could not insist upon his lien as a contractor, but this objection was not sustained by the court, and judgment was given setting up and enforcing the lien as recorded. The exception to this ruling makes the only question for our determination. The plaintiff sustained the contract a double relation; he was not only a mechanic, but a contractor, and had, in both or either one of these capacities, a good right to the lien set up. Code, §1979.

This is distinguished from the case of the *Savannah, Griffin & North Alabama R. R. Co. vs. Grant, Alexander & Co.*, 56 Ga., 68, by the fact that, at the completion of the work in that instance, no law existed giving contractors a lien upon the real estate improved by them. Although the declaration was for a contractor's lien, this court permitted them to amend it, and show, if they could, that the contract was made with them as mechanics, and that they did the work in that capacity.

There is no error in the decision of the court below on this point.

Judgment affirmed.

KENNEDY vs. LEE.

Although a wife's money may have paid for land, yet if the deed was taken in the name of her husband, and by her direction he returned the land for taxation as his own, and if he so represented it to one from whom he sought credit, and obtained it on the faith of the property being his, the creditor having no notice of the wife's right, the land would be subject for the debt, notwithstanding the

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wife's equity, and notwithstanding that, after the credit was given she procured the first deed to be canceled, and a deed to be made to her by the vendor.

- (a.) The facts in the case warranted the charge.
- (b.) If one of two innocent persons enables a third party to cheat the other innocent person, he who put it in the power of the wrong-doer to do the wrong must suffer, rather than he who in no way empowered the wrong-doer or contributed to the injury.
- (c.) Dealings between husband and wife are to be scanned closely, as the relation of the parties facilitates the commission of fraud, which is always private and subtle.

October 2, 1883.

Husband and Wife. Fraud. Debtor and Creditor.
Before Judge CLARKE. Terrell Superior Court. May Term
1883.

Lee obtained judgment on a note made by Kennedy to Stevens, or bearer, and levied on certain property, which was claimed by Mrs. Kennedy, the wife of defendant. On the trial, the evidence showed the following facts: Kennedy bought for his wife, with her money, a lot from one Morrow, who was acting as agent for his mother, in 1875. When the last payment was made, the deed was made by Morrow to Kennedy, without mentioning his wife. In 1879 and 1880, at her request, Kennedy returned the land for tax as his own. This was done, as she testified, because she "thought it would look better." On April 10, 1880, Kennedy gave the note which formed the basis of the judgment. When the deed to Kennedy was delivered to him, his wife was dissatisfied, and they wanted it corrected; but the vendor lived in Florida, and it could not be done at once. The deed to Kennedy was held, and not recorded for about two years, and was then delivered up and a deed was made to his wife; this was done about the time the judgment was rendered (May, 1881), but it was dated July 19, 1880. Stevens, to whom the note was given and who traded it to the plaintiff, testified that Kennedy stated that the title to the property was in him, and credi

was given on the faith of such statement. This was denied by Kennedy.

The jury found the land levied on subject, and certain personality, which had been levied on, not subject. Claimant moved for a new trial, because the verdict was contrary to law and evidence, and because the court charged as stated in the decision.

The motion was overruled, and claimant excepted.

L. O. HOYL, for plaintiff in error.

PICKETT & PARKS; J. H. GUERRY, for defendant.

JACKSON, Chief Justice.

This was a levy on property as the husband's, and claim made to it by the wife. The judge charged the jury that "if Mrs. Kennedy's money paid for the land, but the deed was made to Mr. Kennedy, and while it remained so, Kennedy gave out that the land was his; by her direction returned it for taxes as his own; so represented it to Stevens at the time of obtaining the credit for which the note to Stevens was given; and Stevens gave him that credit on the faith of that property being his, without notice of her right, then the land is subject, notwithstanding Mrs. Kennedy had an equitable right to the land; and notwithstanding she afterwards procured the first deed to be canceled and a deed to be made to her by the vendor."

In view of the facts disclosed by the record, we see no error in the charge. Those facts are sufficient to authorize such a charge, if otherwise the law. It is the law, if the facts authorize it. The principle is universal, that if one of two innocent persons enable a third person to cheat the other innocent person, he who put it in the power of the wrong-doer to do the wrong, though innocent of intention to do wrong himself, must suffer, rather than he who received the wrong, without directly or indirectly empowering or contributing to it.

 Parmelee vs. Williams.

It is another principle well known to our reports, that dealings between husband and wife are to be scanned closely, as the relation facilitates the commission of that fraud which is always private and subtle. The case at bar presents these as its prominent features. Husband and wife in the possession of land—no deed on record—first deed made by agent or vendor to husband—some two years after, deed to wife—that deed antedated—by direction of wife, taxes returned by husband on the property as his own, “because it would look better”—property represented as his own, when credit was given him by the plaintiff; and that credit given him on the strength of this representation, and before any deed to wife, and without any notice of any right, legal or equitable, in the wife, to the creditor. These features, under the rulings of this court, exhibit a countenance with which plain and open dealing does not fall in love, and not that honest front which the law admires. Certainly the wife put it in the power of her husband to get credit on the strength of this land, and to cheat this creditor, if the jury believed him; and having done so, his equity is superior to hers, kept secret and hidden from him and the world at the time he gave the credit.

Brown vs. West et al., 70 Ga., 201; 68 Ga., 524; 60 *Ib.*, 82; 59 *Ib.*, 69; 57 *Ib.*, 235; 56 *Ib.*, 79; 61 *Ib.*, 171, 345; 63 *Ib.*, 307.

Judgment affirmed.

 PARMELEE vs. WILLIAMS.

1. Where a negotiable draft, with a security thereon, was drawn, and accepted by the drawees, who held a mortgage to secure advances, and who received property of the drawer sufficient to pay the draft, after negotiation, the acceptors were primarily and absolutely bound therefor to the holder; the drawer was bound to pay if the acceptors did not, and his security was equally liable with him. As to the holder, the acceptors may be regarded as makers, and the drawer as a first indorser.

Parmelee vs. Whitehead.

2. Where indulgence was granted to the acceptors in consideration of the payment of eighteen per cent interest, and the acceptors became insolvent, the security was thereby released.
- (a.) It would be immaterial if the agreement to pay eighteen per cent interest were illegal and void, and if the holder were not bound by the same, but might, notwithstanding, have proceeded to enforce the payment of this draft, the indulgence being in fact granted.
- (b.) If the drawer had placed in the hands of the acceptors cotton of much greater value than the amount of the draft, they were not accommodation acceptors.
3. In civil cases founded on unconditional contracts in writing, a court will render judgment without a jury, where no issuable defence is filed under oath or affirmation. If there be a single issuable defence filed under oath, judgment by default cannot be rendered; and other pleas are not required to be sworn to, except dilatory pleas and the plea of *non est factum*.

September 18, 1863.

Promissory Notes. Drafts. Acceptance. Indorser. Security. Before Judge BOWER. Baker Superior Court. May Term, 1863.

Reported in the decision.

R. HOBBS; SMITH & VASON, for plaintiff in error.

A. L. HAWES; JONES & WALTERS, for defendant.

BLANDFORD, Justice.

The defendant in error brought her action against William H. Whitehead, as drawer and indorser, and Charles H. Parmelee, security, upon the following paper:

"ALBANY, GA., January 13, 1860.

"On the 15th day of October next, pay to myself or order, six hundred dollars for supplies furnished me to make my crop. This to be an advance under my mortgage to you, under the 13th day of January, 1860, homestead and other exemptions and protest waived. Interest at — per cent. from — day of — 187—

(Signed)

To WELCH & BACON,
Factors, Warehouse and
Commission Merchants.
Albany, Georgia:

WILLIAM H. WHITEHEAD.

C. H. PARMELEE, Security."

Endorsed.

"W. H. WHITEHEAD."

"Accepted, WELCH & BACON."

Charles H. Parmelee filed several pleas: First, general issue; and a special plea that he was security on the draft, and that the draft was secured by a mortgage made by Whitehead to Welch & Bacon, on his crops of cotton and corn grown on his plantation in Baker county, in the year 1880, and the crops were first to be applied to the payment of the draft; that the crop of cotton was delivered to Welch & Bacon, to pay the draft by Whitehead, to the number of 50 bales of cotton, equal in value to \$1,500; that, although the plaintiff was the holder of said draft before maturity, she did not present the same to Welch & Bacon or Whitehead or to defendant, but at the instance of Edwin L. Wight, their general manager and agent, and in consideration of a sum in interest at the rate of one and one-half per cent per month to be paid to her by Welch & Bacon, to grant indulgence to them beyond the maturity of the draft; and without the knowledge and consent of him, said Parmelee, the indulgence was given by her to Welch & Bacon for the consideration of 18 per cent per annum, from the 15th of October, 1880, to 22d of December, 1880; that she did not present the draft for payment or ask any one to pay it to her, which would have been done if the same had been presented at maturity, and by reason of the non-presentation and of the extension of time given to Welch & Bacon, defendant has been damaged to the extent of the amount of the draft. And defendant further pleads that he ought not to be held bound because of the *laches* of the plaintiff, who held the draft, at and since the maturity thereof; that the draft was secured by the mortgage aforesaid; that the same covered more than enough property to pay the draft; that if the draft had been presented, it would have been paid, and if he had had notice of the non-payment of the same, he could have forced Welch & Bacon to foreclose their mortgage and pay the draft; that Welch & Bacon, confederating with plaintiff, kept the fact of non-payment hid from defendant, and used the cotton carried to them by Whitehead for other pur-

poses, and have become entirely insolvent and unable to pay the draft; which pleas were duly verified by the oath of defendant.*

1. These pleas being demurred to generally, the court sustained the demurrer and dismissed the same, except the plea of the general issue. And the question is, are the special pleas, taken together, a good defence to the plaintiff's action? The defendant in error insists here that the acceptors of this draft or bill of exchange are securities for Whitehead, the drawer and indorser, and Parmelee, his security, and therefore any indulgence, whether upon consideration or not, granted by plaintiff to the acceptors, who were mere securities, as she states, constituted no legal ground of complaint on the part of defendant, Parmelee, the plaintiff in error.

While the drawer or signer of a bill of exchange, such as this, may be under an obligation to pay it, it is only an obligation to pay if Welch & Bacon, the drawees, whom he orders to pay the money, fail to pay it. When Welch & Bacon accepted this draft or bill, they were at once under an absolute obligation to pay the bill, according to its tenor, to any one who might come by it *bona fide* and in a due course of trade, but the drawer, Whitehead, and Parmelee, his security, became bound to pay it if the acceptors did not; and as to the holder of this bill, Welch & Bacon, the acceptors, are to be regarded as the makers, and Whitehead, the drawer, as the first indorser. The respective duties and obligations of these parties stand thus: The acceptors are bound absolutely to pay the bill; the drawer is bound to pay it if the acceptors do not, and Parmelee, being the security of Whitehead, is equally bound with him. 1 *Parsons on Notes and Bills*, section 2, page 54; 59 *Ga.*, 840, 776; Code, §§2773, 2151. It is

*All of the pleas appear consecutively in the record, and at the close is an affidavit that "the facts set forth in the foregoing pleas are true," dated April 30, 1881. Opposite one of the pleas is an entry on the margin, of "amendment sworn to May 10, 1881." Signed, "R. Hobbs, defendant's attorney." (Rep.)

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seen that Welch & Bacon, the acceptors, are not securities for Whitehead, the drawer, or Parmelee, his security, but stand as the makers, and are primarily liable on this bill.

2. The next inquiry is as to the effect of the indulgence granted by the holder of this bill, as set forth in the defendant's pleas (and waiving for the present the question whether the failure of the holder to demand payment of this bill at maturity, but waiting until the acceptors had failed and become insolvent, does not of itself discharge the drawer and his security.) It is alleged in defendant's pleas that time was given the acceptors from 15th October, 1880, to 22d December, 1880, by the holder, in consideration that the acceptors would pay the holder interest at the rate of 18 per centum per annum upon the amount of this bill. Defendant in error contends that the agreement to pay 18 per centum per annum being illegal, and contrary to our usury laws of force at that time, was void, and the holder was not bound by the same, but might, notwithstanding this agreement, have proceeded to enforce payment of this draft; but the indulgence to the acceptors was granted on this agreement, and the same was fully executed by her, and the plea shows that the drawers had sufficient funds in the hands of the acceptors at that time to pay this draft, and that, by reason of this indulgence on the part of the holder, the acceptors failed and became insolvent; that if no such indulgence had been granted, the bill would have been paid at maturity, and that the drawer and his security are hurt by this act of the holder. Code, §2154: "Any act of the creditor which injures the security, or increases his risk, or exposes him to greater liability, will discharge him; a mere failure of the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety." In the case of *Stallings vs. Johnson*, 27 Ga., 564, this court held that a contract between the holder of a note and the maker, similar to the contract

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set forth in defendant's pleas, was binding, and indulgence granted by the holder to the maker upon such an agreement operated to discharge the indorser. This decision is on the point, and made by a full bench, and this court adheres thereto.

It was further insisted by the defendant in error that Welch & Bacon were accommodation acceptors, but the plea avers that the drawer had placed in their hands, to meet this draft, cotton of the value of fifteen hundred dollars. They were not accommodation acceptors, if the allegations in the pleas be true, but were liable as acceptors who had funds in their hands belonging to the drawer, and were primarily liable on this draft.

It is further insisted that the court should have dismissed one of defendant's pleas, because the same was not verified by the oath of the defendant. While it was true as to some of the pleas, the plea of the general issue had been so verified. This position is equally untenable. The constitution of this state declares: "The court shall render judgment, without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defence is not filed under oath or affirmation." Code, §§145, 3448. There was an issuable defence filed under oath in this case, the general issue, which is such defence. The court could not in such a case render judgment, and there was no authority authorizing him to strike other pleas of defendant, although not sworn to. The only pleas that must be sworn to are dilatory pleas, and *non est factum*. The law requires none other to be sworn to, yet there must be an issuable defense filed under oath, or the court will render judgment. Only one is required to be sworn to. This court is of the opinion that the court below erred in striking defendant's pleas for any reason, and the judgment is reversed for these reasons.

Judgment reversed.

Cook vs. The Western and Atlantic Railroad.

COOK vs. THE WESTERN AND ATLANTIC RAILROAD.

[JACKSON, Chief Justice, being disqualified, did not preside in this case.]

1. When this case was before the Supreme Court before, it was held that the grant of a non-suit was error, and that the case should be submitted to the jury. This point is *res adjudicata*, and the jury having found for the plaintiff, a new trial will not be granted on that ground.*
2. An employé of a railroad company may by contract waive his right to sue for injuries not arising from criminal negligence on the part of the company, or its other employés; but any negligence, either of omission or commission, on the part of other employés of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy, and void.
- (a.) The discretion of the presiding judge in granting a first new trial had been exhausted in the case, and the grant of another was error.

November 20, 1882.

Railroads. Damages. Negligence. Before Judge FAIN.
Whitfield Superior Court. April Term, 1883.

Reported in the decision.

W. K. MOORE, for plaintiff in error.

R. J. McCAMY, for defendant.

BLANDFORD, Justice.

The plaintiff brought her action against defendant for the homicide of her husband from the running of its cars, by reason of the negligence of its servants and agents. A verdict having been rendered for plaintiff, defendant moved for a new trial upon several grounds; the court below granted the new trial, and plaintiff excepted, and assigns as error the granting of said new trial; and the matter is thus brought before this court for review.

*See Cook vs. W. & A. R. R., 69 Ga., 619.

1. In looking at the facts set forth in the record, it is not apparent that this accident, which caused the death of plaintiff's husband, was by the fault or negligence of deceased, or the negligence and carelessness of defendant's servants or agents, but it appears to have been one of those unavoidable accidents which sometimes occur in human affairs, when neither party was at fault; but as this case was before this court at September term, 1882, upon a non suit granted by the court below, upon precisely the same state of facts as are now presented in this record, and as this court then held that the non-suit was improperly granted, and that the facts were sufficient to carry the case to the jury, and it was a question alone for the jury to determine whether the injury occurred by the fault of plaintiff's husband or by the negligence of defendant and its agents or servants, this question in this case is *res adjudicata*, and we are not at liberty to say, under the facts, that plaintiff could not recover.

2. The defendant insists that plaintiff cannot recover, by reason of a certain contract made by plaintiff and her husband with defendant, by which it was agreed

"That the said John H. Cook, in consideration that the Western & Atlantic Railroad Company will hire and pay him (defendant's husband) the wages stipulated, which is more than he can get elsewhere, will take upon himself all risk connected with, and incident to, his position on the road, and will in no case hold the company liable for any injury or damage he may sustain while so employed, in his person or otherwise, by what are called accidents or collisions on trains or road, or which may result from negligence, carelessness or misconduct of himself or any other employé or person connected with said road, or in the service of said company, or from any other cause."

This contract was signed by the plaintiff and her husband. It was decided by this court, at the July term, 1878, in the case of *Western & Atlantic Railroad Company vs. Bishop*, 50 Ga., 465, "that a contract, so far as it does not waive any criminal neglect of the company or its principal officers, is a legal contract, and binding on the employé;" and this ruling was had upon a contract

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similar to the one in this case. The same principle was ruled at the July term, 1874, of this court, in the case of *Western & Atlantic Railroad Company vs. Mary Strong* 52 Ga., 461.

In 1876, the legislature thought proper to enact, and made it penal for any person employed in any capacity by any railroad company doing business in this state, who should be guilty of negligence, either by omission of duty or by any act of commission in relation to the matter entrusted to him, about which he is employed, etc., by which any person is injured, etc., such person shall be guilty of the offence of criminal negligence, and shall be punished, etc. Code, §4586 (b).

The contract in this case, above set forth, does, in direct terms, waive and release the defendant from all liability for any injury or damage, which plaintiff's husband may sustain, "which may result from the carelessness, negligence or misconduct of himself or any other person or employé, connected with the road, or in the service of said company, or from any other cause," although such neglect, carelessness or misconduct of defendant's servants or agents is made a crime, and punishable by the terms of the act of 1876, as above cited. Such a contract is void, as was decided by this court in the case cited in 50 Ga., 465. No stipulation to waive any criminal neglect of the company is valid. The same is contrary to public policy, as declared by the statute. Every neglect which causes serious injury to any person by an agent, servant or employé of a railroad company in this state is a crime by the laws of this state. And no release or waiver, by any employé, or other person, of a railroad company, on account of such neglect of its servants or agents, is binding upon the party making the same, but it is utterly null and void since the passage of the act of 1876.

A new trial having been granted prior to the last grant of a new trial in this case, the discretion of the court below to make this last grant of a new trial had been exhausted, on

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that ground. The judgment of the court below granting a new trial in this case is reversed.

Judgment reversed.

STERLING, administrator, vs. SIMS.

1. A chose in possession is where a person has not only the right to enjoy, but also the actual enjoyment of the thing; a chose in action includes all rights to personal property not in possession, which may be enforced by action,—demands arising out of torts as well as contracts. It is sometimes used as the right of bringing an action.
2. The right of an heir to have her interest in the estate of her deceased ancestor, in the hands of his administrator, is a chose in action, and not a chose in possession; and where such right was in the wife prior to 1866, if her husband died before reducing it to possession, the right survived to the wife.
 - (a.) Therefore, where prior to 1866 an intestate died, leaving a married daughter as one of his heirs, and dower was assigned to his widow, the reversion of the land set apart to her was in the estate, and after the widow died, and the land was sold by the administrator and converted into money, the right to have this money was a chose in action; and the husband of the married daughter having failed to reduce it to possession before his death, the right survived to her to the exclusion of his creditors or heirs-at-law.
 - (b.) It made no difference that the wife's interest in her deceased ancestor's estate was in land. The act of 1789 places realty and personalty upon the same footing, as to the marital rights of the husband, and as to the distribution of the estates of intestates.
 - (c.) This case differs from those in 29 Ga., 58; 52 Id., 321; 46 Id., 593; 51 Id., 40.

November 6, 1883.

Husband and Wife. Survivorship. Administrators and Executors. Title. Choses in Action. Before Judge HARRIS. Troup Superior Court. April Term, 1883.

Reported in the decision.

A. H. Cox, for plaintiff in error.

E. M. Lowery, for defendant.

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the same to possession, and if he fails to do so during the coverture, the right survives to the wife; if she survives her husband, she is entitled to them, and not the representative of the husband. 2 Bl. Com., 351. This is the rule at law. Clancy Hus. and Wife, 109. Chief Justice Marshall, in Gallego vs. Gallego's Exrs., 2 Brock., 287, says: "The property does not become the husband's, nor is it subject to the liabilities which attach to that which is his until it shall be reduced to possession. Till then his creditors have no claim to it." The case in 3 Ga. fully sustains the judgment of the court below. It can make no difference that the wife's interest in her deceased father's estate may consist in lands, real or personal property. The act of 1789 places real upon the same footing as personal property, as to the marital rights of the husband, and as to the distribution of intestates' estates. Prince's Digest, 225.

It is insisted that the case of *Prescott & Pace vs. Jones & Peavy*, 29 Ga., 58, conflicts with the case of *Sayre vs. Flournoy*, 3 Kelly, above referred to. It will be seen that the case in 29 Ga. was an action of ejectment brought by the surviving husband to recover a wild lot of land to which the wife had full title during her life. The court, in this case, held that the title to this land passed to the husband, under the act of 1789, and he was entitled to the same. The wife acquired title as heir-at-law of a former husband, deceased, who had died, leaving her alone as his heir-at-law; it was, in law, in her possession, and consequently passed to the second husband, upon his marriage, as fully as it was in the wife before marriage; it did not consist of an undistributed estate, as in the case at bar. So this case is not in conflict with the case in 3 Kelly. And in the case of *Hooper vs. Howell*, 52 Ga., 321, the wife claimed certain lands as having survived to her upon the death of her husband, and it appeared that the lands of the claimant's father had been divided, under his will, between his children, claimant being one before her marriage. It was held by the court that, as the land was wild

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land, the husband had reduced it to possession, so far as the same was capable of being done; that the same vested in the husband, and descended to his heirs-at-law, and that the wife did not take by survivorship. It is quite manifest that the decision last quoted in nowise affects the present case. And so of the cases of *Shipp vs. Wingfield*, 46 Ga., 593; *Rogers vs. Cunningham*, 51 *Id.*, 40.

We are quite clear that the marital rights of Sims, the husband, never attached to the property sued for in this case, so as to prevent the same from passing to Mrs. Sims, the widow, by survivorship; and no judgment obtained against Sims in his lifetime has a lien upon this property in the hands of the administrator of Mrs. Sims's father for distribution among his heirs; that she will take her one-eighth interest, free from any debts or liens against her deceased husband; that this is her property, and does not go to the representative of her deceased husband; and that this is so because, it being a chose in action and not a chose in possession, and never having been reduced into possession by the husband, while in life, it passes to, and becomes the property of, the wife by survivorship.

Judgment affirmed.

McDONALD vs. The STATE OF GEORGIA.

1. As a general rule, when the court has admitted illegal evidence which is subsequently ruled out, this subsequent action of the court will cure the error; but this rule is subject to the exception that, where the illegal evidence, wrongfully admitted, upon the facts of the given case, may have worked such harm or injury to the accused as to render it probable that its subsequent withdrawal did not heal the wounds so inflicted, a new trial will be granted. The facts of this case are such as to render it probable that the error of the court in admitting the illegal testimony was not cured by the subsequent withdrawal thereof.

HALL, J., concurring. JACKSON, C. J., dissenting.

2. Affidavits used on the hearing of a motion for new trial must be properly authenticated and brought to this court. A mere order

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that all affidavits so used be filed in the clerk's office, and the appearance in the record of what purport to be copies of the affidavits, with the entries of filing thereon, is not sufficient; and a ground of the motion dependent on them will not be considered.

February 9, 1884.

Criminal Law. Confessions. Evidence. Practice in Superior Court. Practice in Supreme Court. Before Judge PATE. Dooly Superior Court. March Term, 1883.

Perry G. McDonald was indicted for assault and battery, alleged to have been committed on Stephen Woodward. The fact that he caught Woodward by the beard, pulled him out of a buggy, and committed a battery upon him, was scarcely contested, but it was insisted by the defendant that Woodward grossly and repeatedly insulted him, and gave him such provocation as to justify the battery. The defendant was about twenty-five years of age, while Woodward was about seventy-six. The jury found the defendant guilty. He moved for a new trial on various grounds, the only material one of which is stated in the opinions of the justices. The motion was overruled, and defendant excepted.

One ground of the motion for new trial was newly discovered evidence. In support of this ground, several affidavits appear in the record marked filed in office. There also appears in the record an order that the affidavits, to be used on the motion for new trial, should be submitted to counsel for the other side at least ten days before the hearing, and should be filed in the clerk's office before the hearing. When the case was called in the Supreme Court, a motion was made to dismiss the writ of error, under the ruling in *Warnock vs. Kilpatrick, administrator*, 70 Ga., 730. The court refused to dismiss the case, but declined to consider the ground to which these affidavits applied.

G. W. BUSBEE; GUSTIN & HALL, for plaintiff in error.

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C. C. SMITH, solicitor general ; HARRISON & PREPLES, for the state.

BLANDFORD, Justice.

The plaintiff in error was indicted for an assault and battery. The state, on the trial, offered to prove that a few days after the battery, accused said he wished he had broken every bone in prosecutor, on account of the manner in which he had been treated afterwards by prosecutor. This testimony was objected to by the accused as illegal. The objection was overruled by the court, and the evidence was allowed to go to the jury. Subsequently the court withdrew the evidence from the jury, upon motion of defendant's counsel. The general rule is that, when the court has admitted illegal evidence to the jury, which is subsequently ruled out, this subsequent action of the court will cure the error in the admission of the illegal evidence ; but this rule is subject to this exception : where the illegal evidence, wrongfully admitted, upon the facts of the given case, may have worked such harm or injury to the accused as to render it probable that the subsequent withdrawal of such evidence from the jury did not heal the wounds so inflicted, then a new trial will be granted. This court, in *Hall vs. State*, 65 Ga., 36, intended to go to this extent only, although the language employed by the lamented judge in that case is susceptible of a construction that would carry that case much further.

By applying the minor rule thus laid down to the case now before us, we think it is probable that the error of the court, in admitting the illegal testimony complained of, caused such injury to plaintiff in error as the subsequent withdrawal of the same did not cure, and for this we reverse the judgment, and grant a new trial.

Judgment reversed.

HALL, Justice, concurring.

I concur in the judgment of reversal in this case, not

only for the reasons given by my colleague, but because I do not understand that it is one of the privileges of age to use, without provocation, opprobrious language to and of, and in the presence of another, which tends to a breach of the public peace, without legal responsibility for so doing. Code, §4372. On the trial of an indictment for assault and battery, the defendant may give in evidence opprobrious words and abusive language used by the prosecutor or person beaten, which may or may not amount to a justification, according to the nature and extent of the battery, all of which is to be determined by the jury. Code, §4694.

In this case, opprobrious and insulting words seem to have been used by the prosecutor to the defendant, and notwithstanding his remonstrance and request that it be not persisted in, they were several times repeated, and, as it might be reasonably inferred, with the purpose of drawing him into a difficulty. It seems to me that the only question about which there could be any dispute was, whether the battery was so excessive as to degenerate into aggression, and to show that the alleged provocation was seized upon as a pretext by the defendant to gratify a revengeful feeling, and afford him an opportunity of inflicting upon his opponent unwarranted injury. Upon this question the testimony was pretty evenly balanced, if its weight was not in favor of the defendant's version of the affair. This was a question exclusively for the determination of the jury, and if it had been submitted to them upon the testimony alone, which was legally and properly before them, and the presiding judge had been satisfied to let their finding stand, I would not interpose to arrest or modify it. But such was not the case on this trial; there was confessedly before this jury a fact which might have had a most material effect upon the conclusion they reached, and which had gotten before them improperly and illegally; it was the confession of the defendant that he was sorry that he had not broken every bone in prosecutor's body, be-

cause prosecutor had treated him badly since the difficulty. This last part of the confession was drawn from the witness upon cross-examination, when, upon motion of defendant's counsel, it was ruled out, and the jury were instructed not to consider it. The first part of it was before them for some little time, and may have made an impression of which it was difficult, if not impossible, for them wholly to divest themselves. Who can say that the defendant was not thereby prejudiced? It should be borne in mind that in such investigations something more than probability, however strong it may be, is required to sustain a verdict of guilt. A reasonable doubt acquits, and innocence is presumed, and the presumption continues until it is overcome by competent and sufficient proof.

The cautious and conscientious judge who tried this case used what seemed to him every precaution to prevent improper confessions from getting before the jury, but in spite of his caution and the vigilance of counsel, the very thing he sought to avoid took place. It is further apparent that when the wrong was discovered, it was promptly rectified, so far as it could be done, though, as we have seen, the attempt to arrest it was not probably successful. I do not think this defendant has had a fair trial, and am of opinion that, upon another hearing, these irregularities prejudicial to him can, as they should, be corrected. The practice established by *Hall vs. The State* is salutary and promotive of the ends of justice. I am unwilling to depart from the eminently proper rule therein laid down. Its requirements were evaded by the witness in this instance. In the preliminary examination that took place, he withheld from the court the only fact that rendered this confession inadmissible; perhaps he did so ignorantly, but whatever his motive may have been, the failure to state it in time was none the less hurtful to the defendant. When it came to light, there was no alternative left to the defendant but to move to rule it out. Had he remained silent and inactive, this might have been treated as an implied con-

McDonald vs. The State of Georgia.

sent to the propriety of the evidence, and a waiver of the objection. I would not go so far as to favor a new trial in a less doubtful case, on account of the impression made by improper evidence, promptly rejected by the court when it was perceived, and accompanied with a caution to the jury not to consider it in their deliberations.

JACKSON, Chief Justice, dissenting.

The point on which the majority of the court think that the court below should be reversed and a new trial be granted, is embodied in the fourth ground of the motion for a new trial, which is as follows: "Because the court erred in permitting T. J. Folds over defendant's objection to testify as to a conversation he heard between defendant and a brother of witness a day or two after the fight took place, the examination of said Folds having taken place out of hearing of the jury, to determine whether his testimony as to said confession should go to the jury; when said Folds said, 'I am sorry now that I did not break every bone in his body.' The court permitted this testimony, over defendant's objection, to be stated in hearing of the jury, but after the witness modified by saying, 'defendant said he made the remark because the prosecutor had aggravated him so since the difficulty,' the court ruled the testimony out, not until it had been stated in presence of the jury." Before certifying the correctness of this ground, the court modified it by a note, which is as follows:

"The testimony was ruled out, on motion of defendant's attorney, and the court stated at the time to the jury that they were not to consider the evidence ruled out."

It will thus be seen that the presiding judge followed the practice commended in the case of *Hall vs. The State*, 65 Ga., 36, had the examination upon the admissibility of the evidence in this case conducted out of the hearing of the jury, and admitted or decided to admit this saying of defendant "I am sorry now that I did not break every bone in his body;" but after that much had gone to the

jury, and the witness added that "defendant said he made the remark because the prosecutor had aggravated him so since the difficulty," on motion of defendant's counsel, the whole of it was ruled out, and the court told the jury not to consider it at all. So that the question here is whether, when a judge admits a saying like this, and then a motion is made to rule it out by the defendant, and it is ruled out, a new trial should be granted on that ground. In my judgment, the court below was right in overruling the motion for a new trial on this ground. The evidence which the jury heard is simply the expression of regret by defendant that he had not broken every bone in the prosecutor's body, because he had aggravated him so since the difficulty. Even if the rule were that the withdrawal of evidence illegal, and the charge not to consider it, would not heal the error of its admission, in some exceptional cases, in my judgment, this is not a case to be excepted. The assault and battery was not denied. Every witness proved it—the defendant's statement admitted it—the only question was, did the opprobrious words used by the prosecutor justify it? The sayings admitted were, therefore, in no conceivable view that I can take, so important as to make this case an exception to the general rule that, where a judge admits evidence illegally, but afterwards rules it out, and tells the jury not to consider it, a new trial will not be granted. I do not recall a single case where, such being the facts, a case was ever reversed on that ground by this court.

In respect to the analogy between this case and the case of *Hall vs. The State*, in 65 Ga., 36, my eyes are too dull to see it.

That is a case where the whole examination touching confessions of the defendant, and how far extorted by fear, was had in the hearing of the jury, where there was no evidence of guilt, except circumstantial; but the confessions of the defendant alone involved him in guilt: where the issue was murder, and who committed the hom-

icide; where a pistol was fired just over the defendant's head to make him confess; where the scene occurred in the court-house, and the guard itself thus illegally extorted the confessions; where the evidence was not admitted, and therefore not ruled out on motion of defendant's counsel, as here ruled; where the jury were not told, as here, not to consider it, but where every man on the jury knew that defendant had confessed his guilt, just as well as if he had confessed it to them, and believed it, though it was extorted; and where the preservation of the great rule that extorted confessions should not criminate men, constrained this court to rule that, in that case, "impartial justice" to the negro "demanded a new trial."

Mark the language of the accurate and cautious judge who delivered the opinion in *Hall vs. The State, supra*: "It is the unanimous judgment of this bench that, where such preliminary examinations as this are to be had, the better practice is, and impartial justice demands it, that the jury should be retired from the box whilst the admissibility of the evidence is considered by the court." The words, "as this," with the word "such," qualify the sentence, and control the meaning of the judge; and great would be the astonishment of Judge Crawford to ascertain that the principle thus declared and qualified had been applied to a case such as this now at bar. Indeed, in 65 Gr., 509, Judge Crawford himself alludes to the ruling in *Hall vs. The State*, and again emphasizes the elaborate statement made of the facts there, and the difficulty of dislodging such impressions from the jury.

I forbear to say aught about the facts of the case—the age of the prosecutor and the vigorous manhood of the defendant; the provoking language of the man of seventy-six, who was beaten, and the energetic assault of the man of twenty-five, who jerked him out of his buggy by the beard, to the ground, and pummelled him there, with demands that he take back the provocation, because the jury has passed on all that: nor shall I cite the numerous

cases where this court has ruled that even the erroneous charge of the court, or the illegal admission of evidence, though not withdrawn, would not suffice to grant a new trial here, over the discretion of the presiding judge, unless that discretion has been abused; nor show that this case falls within many of them, even if the evidence had not been withdrawn at all.

It is the principle ruled from which I dissent; and the duty which I owe to the state, not to permit such a principle to be applied to such a case without protest, requires me, with the utmost respect for my able and learned colleagues, to dissent from the judgment of reversal.

WAY et al. vs. LOWERY.

1. Where the record of a deed showed that it conveyed lands in different districts of a certain county, the number of each district being first written in figures on the margin, and then written in words, and followed by the number of the lots conveyed in that district, and where the numbers of the districts ran from six to sixteen consecutively, and then followed "17th" in figures and "seventh" in writing, after which followed eighteenth and other districts in consecutive order, a certified copy of the record of such deed was admissible in evidence to show title to certain lots in the seventeenth district; and where it appeared that there was, in fact, no seventh district; that a portion of the lands covered by the deed was in another county, and that the record there showed that the lots were in the seventeenth district, the jury were warranted in finding that the word "seventh" in the record in the county where the land lay, was a clerical mistake.
- (a.) Some of the lots being in one county and some in another, and the deed being recorded in both, a certified copy from the records of the county other than that in which the land in controversy lay, was admissible to show an error in the record of the same deed made in the county containing the land.
2. Title being shown out of the ancestor of the plaintiffs, a verdict for the defendant was right.

December 4, 1883.

Evidence. Deeds. Ejectment. Title. Records. Be-

Way et al. vs. Lowery.

fore Judge LAWSON. Laurens Superior Court. February Term, 1888.

Way et al. brought ejectment against Lowery for lot of land number 10, in the 17th district of Laurens (formerly Wilkinson) county. Plaintiffs claimed under Peter J. Williams; defendant sought to show a conveyance from P. J. Williams to Colby, Chase and Crocker in 1834. In support of this defence, he offered in evidence a certified copy of a deed from the records of Laurens county. This deed conveyed a large number of lots of land in different districts of Wilkinson county as originally laid out. It began with the sixth district; then followed the seventh; and so on regularly till sixteenth; after this, the next district is stated in the record as follows: "17th" (on the margin). "In the seventh district." Number 10 was included in this item. Then follows the eighteenth district, etc., up to twenty-first. The deed was objected to, as not covering the land in dispute. The objection was overruled. Defendant then offered in evidence a certified copy from the records of Telfair county of a deed in all respects similar to the above, except that the district above described was called "the seventeenth." This was admitted over the objection of plaintiffs' counsel. [It appears that the original Wilkinson county was considerably divided, and a part was embraced in Laurens and a part in Telfair county.] A county map was also introduced in evidence, to show that Laurens county did not contain any seventh district, but did contain a seventeenth district. After verdict for defendant, plaintiffs moved for a new trial, alleging error in the above rulings, among others, and upon its refusal, excepted.

J. F. DeLACY, by J. H. LUMPKIN, for plaintiffs in error.

R. A. STANLEY, for defendant.

BLANDFORD, Justice.

This was an action of ejectment brought upon the de-

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mises of the heirs-at-law and devisees of Peter J. Williams, deceased, and William Pitt Eastman, against Lowery, the defendant, for the recovery of lot of land number ten in the seventeenth district of Laurens county. The plaintiffs relied on plat and grant from the State of Georgia to Peter J. Williams, dated 9th day of February, 1834, to the premises in dispute, also the will of Peter J. Williams, and closed. Defendants tendered, and read in evidence to the jury, an exemplified copy of deed from Peter J. Williams to Stephen Chase, Abram Colby and Samuel Crocker, dated 28th day of February, 1834, to lot of land number ten in the seventh district of Wilkinson county, which deed had numbered in numerals on the margin from 6 to 21, inclusive, the same being opposite to the numbers of the land districts containing the lots conveyed, which were written in the body of the deed. Opposite to the words "seventh district," written in the body of the deed, were the figures "17th," and in this district was lot number ten, being the lot sued for. The defendant also introduced an exemplified copy of a deed from Telfair superior court, containing all the lots of land by their numbers and districts, which was, in all respects, the same as the copy from the record of Laurens superior court, except opposite to the figures "17th" there were written the words, "seventeenth district;" also a map of the county of Laurens, which showed that there was no seventh district in the last mentioned county. These deeds were objected to by plaintiff, because in the first named deed, the lot number ten is described as in the seventh district, whereas the lot in dispute is in the seventeenth district. The court overruled the objection, and this is the main ground of error relied on by plaintiffs.

We think the copy deed was properly admitted in evidence, over the objection made by plaintiffs in this case. When the deed itself is scrutinized, it may be fairly inferred that the word "seventh" opposite to the figures "17th," was a mistake made by the clerk in recording the deed. The deed commences with the sixth district, and goes reg-

Morgan et al. vs. Printup Brothers & Pollard, for use.

ularly on through the sixteenth district, and then the figures 17th, and the word seventh, then follows teenth, and so on to the twenty-first district. These taken in connection with the fact that there is no sixteenth district in Laurens county, and the further fact that the same deed had been first recorded by the clerk of the superior court of Telfair county, in which county many of the lots conveyed are situated, and the copy from the deed contains all the districts from six to twenty-one inclusive and consecutively, and includes lot number ten in the seventeenth district, the jury were authorized to find that the clerk in Laurens county, when he recorded the deed, made a mistake in writing seventh district, when he should have written seventeenth district.*

These deeds being admitted, they showed title to the land in controversy out of Peter J. Williams in his lifetime, so it follows that the lessors of the plaintiff, and their heirs-at-law and devisees of Peter J. Williams, have no title to this land, and the lease of plaintiff fails.

The court did right to refuse the new trial in this case. Judgment affirmed.

MORGAN *et al* vs. PRINTUP BROTHERS & POLLARD, for use.

[Jackson, Chief Justice, did not preside in this case.]

1. Suit having been brought on four promissory notes, two of which expressed their consideration to be a steam engine and a press, and the other two a cotton gin, a plea which stated that the consideration of the notes for the steam engine had entirely failed and that the consideration of the notes given for the gin had failed because the gin was represented to be a good gin, when, in fact, contrary, its ribs were made of inferior soft metal, and wore out in the first season, was substantially a plea of partial failure of consideration.
2. A plea of total failure of consideration includes partial failure of consideration.

*Compare 68 Ga., 455.

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consideration; and under the former plea, a defendant may obtain an abatement in the sum agreed to be paid, if the evidence shows a partial failure and the extent thereof.

December 4, 1863.

Promissory Notes. Failure of Consideration. Pleadings. Before W. M. REESE, Esq., Judge *pro hac vice*. Columbia Superior Court. March Term, 1863.

In addition to the report contained in the decision, it is only necessary to state that each of the first two notes stated its consideration to be "one 6 H. P. engine, 2d hand, and 1 Smith H. P. cotton press;" and the other two stated their consideration to be a cotton gin. The plea of failure of consideration, filed by Morgan, was as follows:

"Defendant says the consideration for which the note for the one 6 H. P. Scofield engine was given has entirely failed, because he says plaintiffs warranted said engine to be full six horse power, and to be in good condition, in all which plaintiffs were mistaken, the engine not being full six horse power, nor was it in good condition, but was a source of annoyance and expense to defendant almost from the time he first bought it until it finally broke down entirely, and is now worthless. And of this he puts himself upon the country. And for further plea in this behalf, defendant says *actio non*, etc., because he says the consideration of the gin note has failed, because he says the gin was represented as a good gin, when, on the contrary, the ribs of said gin were made of inferior soft metal, and wore out the first season."

SALEM DUTCHER, for plaintiffs in error.

W. D. TUTT, by W. K. MILLER for defendant

BLANDFORD, Justice.

1. The defendants in error sued plaintiffs in error on four promissory notes, two for the expressed consideration of one steam engine and one cotton press, two for expressed consideration of one cotton gin. Defendant pleaded that the consideration of the notes for the steam engine has entirely failed, etc.; and the consideration of the gin notes

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has failed, because the gin was represented as a good gin, when, on the contrary, the ribs of the gin were made of inferior soft metal, and wore out the first season, etc.

The court charged the jury, *inter alia*: 'As to the engine, defendant pleads a total failure of consideration. He might have pleaded a partial failure of consideration, but he has seen fit to plead a total failure of consideration. I charge that, to sustain this plea, he must establish to your satisfaction that the engine was entirely worthless. If you find any evidence before you as to a partial failure of consideration as to this engine, you cannot consider it under this plea of total failure.' To this charge the defendants excepted, and on this exception error is assigned.

The plea in this case is sufficient, under the judiciary act of 1799, which is embraced in our Code; it plainly, fully and distinctly sets forth the defendant's defence to this action, and when applied to the plaintiffs' cause of action, it is a plea of partial failure of consideration. The notes sued on were given for a steam engine, cotton press and gin, and no failure of consideration is alleged in the plea as to the cotton press; as to that plaintiffs can recover for its full value.

2. We are also of the opinion that, strictly under a plea of total failure of consideration, a defendant would be entitled to an abatement of the sum agreed to be paid, if the proof should show that there had been a partial failure of consideration and its extent. This plea of total failure of consideration includes partial failure. *Omne majus continet in se minus.* So this charge of the court was error.

Judgment reversed.

PITTS vs. ALLEN.

- 1 If one person contracted to serve another for a certain sum of money, and at the same time stipulated that, if he should die before the expiration of the term of service, he should receive nothing for his services, this would be a good contract, founded upon a sufficient consideration, and would be legally binding upon both parties; and if the party who was to render the services should die before the expiration of the term, his legal representatives would not be entitled to recover anything. Such a contract of service would furnish a good consideration for a promissory note given by the hirer.
2. Where the consideration expressed in a promissory note was "for value received," in a suit thereon, the defendant might plead and prove by parol that the consideration was a contract of hiring which had failed, according to its own terms, by reason of the death of the person; *aliter*, if the consideration had been stated in the note.
 - (a.) The expression, "value received," is a patent ambiguity, and it may be explained, and failure of consideration shown by parol.
 - (b.) The cases in 43 Ga., 190; 60 Id., 158; 68 Id., 821, discussed and harmonized with the present case, and the last case overruled in so far as it may conflict with the present decision.
3. If the plaintiff hired a person of full age to the defendant, and received from him the note in suit for the services of the person so hired, this was an illegal transaction, and the note so given was void as being contrary to public policy and in violation of the thirteenth amendment to the constitution of the United States, and of par. 17 of the bill of rights in the constitution of Georgia.

November 6, 1883.

Contracts. Evidence. Promissory Notes. Public Policy. Master and Servant. Hiring. Before Judge HARRIS. Pike Superior Court. April Term, 1883.

Pitts brought suit in the county court of Pike county against Allen on a promissory note for \$5,560, payable to plaintiff or bearer. The case was carried by appeal to the superior court. The defendant pleaded the general issue and failure of consideration, alleging that the consideration of the note was the hire of a certain negro for twelve months, and that it was agreed at the time that, if the negro died, the note was not to be paid; that defendant was

induced to sign the note on that understanding; that he advanced to the negro clothes, etc., to the amount of about \$17.00; and that the negro, during the same month when the contract was made, died without performing any labor for defendant, beyond making some fires and feeding stock, which was not worth his board. Plaintiff moved to strike this plea, but the motion was overruled by the court.

It is unnecessary to set out the evidence further than to state that it appeared that the plaintiff paid a fine which had been imposed upon a negro man who was convicted of a misdemeanor; that he subsequently hired the negro out to defendant, and for this the note sued on was given. The negro died in about eighteen days after the agreement was made.

The jury found for defendant. Plaintiff moved for a new trial, on the following among other grounds:

(1.) Because the court refused to strike defendant's plea alleging failure of consideration, on the ground that the agreement set up was made before the signing of the note; and because the court allowed parol evidence to be introduced in support of this plea.

(2.) Because the court charged the jury that, if they believed from the evidence that the consideration of the note sued on was the hire of the negro, Underwood, and that the agreement at the time of the contract was that, if the said Underwood died and did not render the service to the defendant, then the note was not to be collected, and if he did so die without rendering such service, then they should find for defendant; but if no such agreement was made between defendant and plaintiff, then they should find for plaintiff.

The motion was overruled, and plaintiff excepted.

E. WOMACK; N. M. COLLINS; F. D. DISMUKE, for plaintiff in error.

J. M. SMITH; JOHN I. HALL; J. J. HUNT, for defendant.

BLANDFORD, Justice.

This was an action upon a promissory note made by defendant, payable to plaintiff or bearer, for the sum of fifty-five dollars and sixty cents, for value received. To this action defendant pleaded failure of consideration, because he says that said note was given for and in consideration of the services of a certain person for twelve months, and at and before the making said note, plaintiff agreed that, if the person whose services were to be rendered to defendant died before the expiration of the year, then nothing was to be paid for such services, and that the person did die after the expiration of sixteen days. The court below held this to be a good plea in bar of plaintiff's right to recover.

1. The only question is, was this a good defence to plaintiff's action. One contract may be a good consideration of another contract. If one person contracts to serve another for twelve months for a certain sum of money, and at the same time stipulates that, if he should die before the expiration of the term of service, then he should receive nothing for his services, this would be a good contract, founded upon a sufficient consideration, would be legally binding upon both parties, and if the party who was to render the services should die before the term of service expired, then his executor or administrator would not be entitled to recover anything. And this contract of service would be a good consideration for a promissory note given by the hirer for such service.

2. It is contended by plaintiff in error that parol evidence cannot be admitted to show failure of consideration of this note by showing that the consideration of the same was for the hire of the person mentioned for twelve months, and that if the person hired should die before the expiration of the term of service, that plaintiff should receive nothing for such service, because it would add to, contradict and vary the written note. The note only expresses

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the amount to be paid; it does not express the consideration, other than for value received. The testimony would only show the consideration of the note; in other words, it would explain the meaning of the words "value received," it would in no sense add to, contradict or vary the writing. The contract between the parties being a lawful contract; is the value received mentioned in the note; this rule of the common law would not be violated by the admission of such evidence. It has ever been held that parol evidence is admissible to show the consideration of a promissory note such as this, and in all cases, unless the consideration be stated in the writing; and in such case of express consideration in the writing, then the same cannot be shown by parol to be different from that expressed.

The expression "value received," in this note, is a patent ambiguity, doubtless; it does not express what value has been received by the maker. Parol evidence is admissible to explain all ambiguities, both patent and latent. Code, §§3801, 2757; 21 *Ga.*, 526. Such evidence is admissible to show a failure of consideration, (30 *Ga.*, 482), and this case is in point to show that parol evidence is admissible to show the consideration of the note sued on, and that there was a failure of the same, whatever that consideration may be; and this case fully sustains the case of *Smith and another vs. Brooks*, 18 *Ga.*, 441, in which it was decided that where a promissory note like the one at bar, expressing as the consideration value received, was given for the hire of a slave, parol evidence was admissible to show that the plaintiff agreed that if the slave died before the end of the year, he should only receive pay *pro rata* for the time he lived, and that the slave died before the end of the year, to sustain a plea of partial failure of consideration.

But it is insisted that the cases of *Lester & Lester vs. Fowler et al.*, 43 *Ga.*, 190; *Haley, ex'r, vs. Evans*, 60 *Ga.*, 158, and *Stripling vs. Holton*, 68 *Ga.*, 821, overruled the case of *Smith et al. vs. Brooks*, 18 *Ga.*, 441. An examina-

tion of the records in those cases referred to will show a different state of facts from the case of *Smith vs. Brooks*, and from the case now being considered. In the case of *Lester & Lester vs. Fowler et al.*, 43 *Ga.*, 190, the defendant sought to prove, in defense to an action brought upon a promissory note given by defendant to plaintiffs as attorneys at law, for services in defending defendant against a criminal prosecution, that after the services had been rendered, the plaintiffs agreed that, as they had failed to clear defendant, the plaintiffs were to receive nothing for their services. These facts do not appear in the record of that case, as reported, but are in the original record. In the case of *Haley vs. Evans*, 60 *Ga.*, 158, the note sued on expressed as the consideration thereof certain lots of land, mentioned by numbers and districts. It was sought in that case, to prove a different consideration from that stated in the note. This court ruled, in that case, that this could not be done, which was obviously correct. Code, §2740. The case of *Stripling vs. Holton*, 68 *Ga.*, 821, comes nearer to the case at bar, and *Smith vs. Brooks*, and also the case in 30 *Ga.*, 482, than any other case that can be found in our reports, and would seem to be in direct conflict with the cases mentioned. So far as the case of *Stripling vs. Holton* is in conflict with *Lufburrow vs. Henderson*, 30 *Ga.*, 482; *Smith vs. Brooks*, 18 *Ga.*, 441, it is overruled, and those decisions are affirmed. The case of *Stripling vs. Holton*, 68 *Ga.*, 821, announces a correct principle of law, but the same is not applicable to the facts in that case, as will be seen by an examination of the original record. The facts are similar to the facts in this case, and as to the principles of law announced in that case, the same are correct, and are not in conflict with the cases in 18 and 30 *Ga.*, before referred to, but the application of the principles to the facts, in that case, is wrong. By looking at the opinion of the judge who delivered it, which is on file, it will be found that it is based upon the cases in 43 *Ga.*, and 60 *Id.*, already examined above.

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3. This record discloses a transaction between the parties which fails to meet with our approbation. It shows that the plaintiff hired a person of full age to the defendant, and the defendant gave the note sued on in this case to plaintiff for the services of the person so hired. This was an illegal transaction, and this note is void, as being contrary to public policy, and violative of the thirteenth amendment to the constitution of the United States, and also of par. 17 of the bill of rights of this state.

The court below having refused a new trial in this case, and the verdict of the jury having been for the defendant, the judgment of the court below, refusing the new trial, is affirmed.

Judgment affirmed.

ABERCROMBIE *et al.* vs. BUTTS, administrator, *et al.*

[Hall, Justice, did not preside in this case.]

1. An acknowledgment, to relieve the bar of the statute of limitations, must be made known to some person. A mere private memorandum, unsigned, and found after the death of the maker, is not sufficient.
2. The paper relied on in this case indicates that the sums were to be paid out of the estate of the writer, and would thus seem to be testamentary in character; but as such, it is insufficient for want of proper execution.
3. The usee for life died in 1857, and the right of action to the remaindermen then accrued; the youngest must have become of age by 1878; allowing the same time for them to bring suit after becoming of age as if they had been of age when the act of 1869 was passed, viz.: nine months and fifteen days, the suit brought by them in 1880 was barred.

November 6, 1882.

Statute of Limitations. Written Instruments. Before B. A. DENMARK, Esq., Judge *pro hac vice*. Upon Superior Court. January Term, 1883.

Francis J. Abercrombie *et al.*, the children and grand-

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children of Nancy H. Trice (formerly Nancy H. Gibson) and of James Trice, brought their bill against John A. Butts, administrator of James Trice, deceased, for an accounting for certain property left by the will of James Gibson, who died in 1853, to his daughter, Nancy Trice, for life, with remainder to her children. James Trice was the executor of Gibson and had in his hands the funds passing under this item of Gibson's will. He sold property so received, and invested in his own name. He died in April, 1880. Nancy Trice died in 1857. The paper copied in the decision was found among the papers of James Trice after his death, and was relied on by the complainants as relieving the bar of the statute. Certain creditors of James Trice were made parties by consent. The facts above stated appearing from the bill, on demurrer it was dismissed and complainants excepted.

JOHN I. HALL, for plaintiffs in error.

M. H. SANDWICH; J. A. COTTEN; A. M. SPEER; BOYNTON & HAMMOND; ALLEN & TISINGER; J. H. HALL, for defendants.

BLANDFORD, Justice.

The defendants demurred to the bill filed by plaintiffs in error, among other grounds, because the plaintiffs' claims upon the estate of James Trice, deceased, were barred by the statute of limitations. The court sustained the demurrer on this ground, and dismissed plaintiffs' bill, and this ruling is excepted to and error assigned thereon, and this writ of error is brought to review and reverse the decree dismissing said bill.

To take the case from under the operation of the statute, the plaintiffs rely upon a paper in the handwriting of the intestate, Trice, which was found among his papers after his death. The paper is as follows:

Nancy H. Trice received from her father's estate \$7,160.00, to be equally between her children, each one's share \$550.77. Pay

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out of J. Trice's estate. Jan., 1876. Aggregate amount for thirteen children \$20,160.10."

There was no signature to the paper; on the back of the same there was written in the handwriting of said deceased as follows:

"For Nancy Trice's children."

The complainants to the bill were Nancy Trice's children. Nancy Trice was the child of James Gibson, and she had intermarried with said James Trice, and died in 1857. Her father, James Gibson, died in 1853, leaving his last will and testament, by which he had devised and bequeathed to his said daughter, Nancy Trice, certain real and personal property for and during her life, and after her death to her children. Said James Trice was qualified and appointed the executor to the will of said James Gibson. James Trice died in April, 1880; the bill was filed in September, 1880.

The main question in this case is, whether the writing found among the papers of James Trice after his death, unsigned by him, was a sufficient acknowledgment of his indebtedness to complainants, so as to prevent the bar of the statute of limitations of the 16th March, 1869.

The Code, §2939, provides as follows: "A payment entered upon a written evidence of debt by the debtor, or any other written acknowledgment of the existing liability, is equivalent to a new promise to pay."

It is insisted for plaintiffs that the writing referred to is a written acknowledgment of an existing liability, and sufficient to create a new promise to pay. If this writing had been given to plaintiffs by Trice, or made to any one else for them, then there might be some foundation for the assumption of plaintiffs; but the circumstances stated in the bill show that the writing found among Trice's papers at his death was unsigned by him. He had never made known the same to any one during his life. How can it be said to be an acknowledgment? An acknowledgment is the admission of the truth of any fact. How can it be said

that this writing is the admission of the truth of the facts therein stated, when it was never made known to any one? The paper indicates that the sums mentioned therein are to be paid out of the estate of the writer, and thus it would seem to be testamentary in its character,—a something which he wishes done after his death. Not signed or properly attested, it fails as a testament; it is but a bare resolution, which could have no effect until legally declared; it fails as an acknowledgment, because it was never made known by the writer; hence the paper mentioned is not sufficient to create, nor is it equivalent to, a new promise.

A question similar to this came before the Supreme Court of Missouri. It was where a person wrote a will in his note-book, and signed the same, whereby he directed, that out of his estate his wife was to pay all his debts, including a debt due his mother of about four hundred dollars. That court says: "A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered either to the creditor or any one else, cannot have the effect of preventing the operation of the statute." 70 Mo., 138, *Allen vs. Collins*. Chief Justice Shaw, in the case of *Merriman vs. Leonard*, 6 Cushing, 150, where the acknowledgment of the debt was contained in a mortgage duly executed and acknowledged, which was never delivered to the mortgagee, but was found after the mortgagor's death among his papers, held that it did not amount to an acknowledgment of the debt, or of a willingness or intention to pay, from which a promise could be implied. The deed was never delivered, and was not an instrument by which the signer was bound.

These cases referred to, and which might be greatly multiplied, are much stronger than the case now under consideration; no promise to pay can be inferred from the instrument set out in plaintiffs' bill, under the circumstances under which the same was found, and the court below did right in sustaining the demurrer, notwithstanding the writing.

Abercrombie et al. vs. Butts, administrator, et al.

2. But it is insisted by plaintiffs in error that the bill and amendment thereto showed that Trice received the legacy of his wife, Mrs. Nancy Trice, as executor of James Gibson, her father; that he held it as her trustee during her life, so as to preserve the remainder to her children, under Gibson's will. Mrs. Trice died in 1857; then her children had a right of action against James Trice for the property in his hands. The trust then ceased, and this right of action then accrued to them against James Trice, upon the death of their mother, Nancy; and this was before the first of June, 1865; and by the act of March 16, 1869, all actions which accrued before the first of June, 1865, must be brought before the first day of January, 1870, or be forever barred. As Mrs. Trice died in 1857, her youngest child must have arrived at majority in 1878. There is no saving clause in the act of 1869, but this court held that, under the equity of this act, where one was an infant at the time of its passage, he should have the same time to bring his action, upon coming of age, as persons were allowed by the act; that is to say, from the passage of the act to first of January, 1870, which was nine months and fifteen days. See 55 *Ga.*, 87.

As it is apparent that all of Mrs. Trice's children were of full age in 1878, and they failed to bring this bill within nine months and fifteen days after attaining their majority, the bill not being brought until 1880, it follows that they were barred by the act of March 16, 1869. And there was no error in sustaining the demurrer to this bill, and the judgment of the court dismissing the same is affirmed.

Judgment affirmed.

Inman, Swann & Company v. Foster, trustee, et al.

INMAN, SWANN & COMPANY vs. FOSTER, trustee, et al.

Where a decree in equity has been before the Supreme Court, and the judgment of the court below has been affirmed, a bill of review will not lie to reverse such decree.

(a.) A decree rendered against executors in favor of legatees, fixing the entire amount due by such executors on account of a *devastavit*, is not inconsistent with a decree against certain other parties for the amount in which they aided in such *devastavit*. The two are consistent and intelligible, when construed with the pleadings.

December 4, 1883.

Res adjudicata. Equity. Judgments. Before Judge LAWSON. Greene County. At Chambers. June 4, 1883.

Reported in the decision.

HOOK & MONTGOMERY, for plaintiffs in error.

F. C. FOSTER; J. A. BILLUPS, for defendants.

BLANDFORD, Justice.

The plaintiffs in error filed this bill against defendants to enjoin a decree which defendants had recovered against plaintiffs, and to review and reverse the same. When the original case came before this court, as reported in 65 Ga., 82, this court held that the decree rendered against the executors of R. J. Willis should be affirmed, but that so much of the decree as found against Inman, Swann & Co. be reversed, upon the ground that the executors were liable to the complainants in the original bill for the whole *devastavit*, but that Inman, Swann & Co. were only liable to the extent that they participated and assisted in the *devastavit*. Upon the next trial, the jury found against Inman, Swann & Co. for their participation in the *devastavit* committed by the executors. A new trial was moved for, and the same being refused, that decree was brought before this court at the September term, 1882, of the court, when the judgment of the court below was affirmed.*

McKinney vs. McKinney.

This present bill proposes to review and reverse the decrees which have been rendered in this case between the same parties. The court below held that there was no equity in the bill, and refused the injunction prayed for and plaintiffs in error except to this ruling of the court below.

The decision of the court is clearly right—4 *Ga.*, 558—in which case this court held that where a decree in equity had been before the Supreme Court, and the judgment of the court below affirmed, a bill of review will not lie to reverse such decree.

The counsel for plaintiffs in error insist that the decree first rendered in favor of defendants in error against the executors of Willis, and the decree rendered in favor of defendants in error against Inman, Swann & Co., when taken in connection with the pleadings in the case, are inconsistent, and cannot be intelligibly executed or understood. We think that there can be no difficulty in understanding the decrees complained of. The decree against the executors found the amount the defendants in error, who were complainants, were entitled to for the *devastavit* committed by the executors. The decree against Inman, Swann & Co. found the amount for which they were liable, by reason of having assisted and participated in the *devastavit* committed by the executors. The first decree fixed the whole amount due defendants in error, and of this amount the last decree fixed the liability of Inman, Swann & Co.

Judgment affirmed.

McKINNEY vs. McKINNEY.

1. The verdict is supported by the evidence.
2. Where one great-granddaughter of a common ancestor was the wife or a propounder of a will and codicil, and interested in the result, and another great-granddaughter of the same common ancestor was the wife of a juror, the juror was related to the wife of the propounder by affinity within the fourth degree, but was not

McKinney vs. McKinney.

and was incompetent. The court refused to grant the new trial; and this is excepted to and error assigned thereon.

1. In looking through the testimony in this case, the verdict of the jury is fully sustained by the evidence submitted by the parties in this case, and there was no error in refusing the new trial on the ground that the verdict was contrary to the evidence, etc.

2. It is insisted by the plaintiff in error that Freeman, the juror, was incompetent, by reason of his relationship to the parties in this case. It appears that one Mays had born to him a son named Robert, who had a daughter named Caroline, who was the mother of the wife of the juror, Freeman. The same Mays, the ancestor, had another son named Thomas, who had a daughter named Lou, who was the mother of Lena, the wife of James R. McKinney, the propounder and legatee. The juror was related to Lena, the wife of the propounder, by affinity, within the fourth degree, but he was not related to McKinney, the propounder, except by double affinity. He would have been incompetent as a juror, had he been challenged before he was taken on the jury, but the jury found against the codicil, under which alone Mrs. Lena McKinney had any interest in this case; and if there had been no codicil, she, Mrs. Lena McKinney, would have had no interest in this case, and then there could not have been any ground upon which the juror would have been incompetent, as he was in nowise related, by consanguinity or affinity, to James R. McKinney, the propounder and legatee. The jury having found against the codicil, and Mrs. Lena McKinney being content, she is out of the litigation, and her rights, if any, foreclosed, and the propounder and caveator being satisfied with the verdict finding against the codicil, the caveator is not hurt by reason of Freeman's having been one of the jury; and the court which tried the case being satisfied to let the verdict stand; and as this court can see no good to result from a new trial in this case, none of the parties to the case being hurt on account

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of the juror, Freeman, having served on the jury, the judgment of the court refusing a new trial in this case is affirmed.

Judgment affirmed.

LILLY vs. BOYD.

1. When a person who wishes to purchase land retains an attorney to examine the titles, and such attorney reports to his client that the title of the person from whom he wishes to purchase is good, and it would be safe to purchase, and this report of the attorney is false, he is guilty of a breach of duty, and a right of action immediately accrues to the client. If no special damage or injury has resulted to the client, then he may nevertheless recover nominal damages; if special damage result from the misconduct of the attorney, it is not of itself a cause of action; the breach of duty imposed by the contract is the cause of action, and not the consequential damage resulting from it. And the statute of limitations begins to run from the date of the breach of duty.

(a.) Such advice having been given on March 25, 1866, and suit having been commenced on September 26, 1881, it was barred by the statute of limitations.

September 11, 1883.

Attorney and Client. Actions. Statute of Limitations. Damages. Before Judge ESTES. Lumpkin Superior Court. April Term, 1883.

Reported in the decision.

W. F. FINDLEY; G. N. LESTER, for plaintiff in error.

J. M. BISHOP; H. THOMPSON; C. D. PHILLIPS; M. L. SMITH, for defendant.

BLANDFORD, Justice.

O. A. Lilly brought his action on the case against Wier Boyd, in which he alleged that on the 25th March, 1866, he paid defendant for his opinion as an attorney at law; that defendant had previously thereto been employed

Lilly vs. Boyd.

as such attorney to investigate the titles to certain lots of land, and upon the advice and opinion of said attorney that plaintiff purchased said lands; that on the 12th day of April, 1880, he and his assigns were duly evicted from four-fifths of the lands mentioned. The declaration was demurred to, on the ground that the plaintiff's cause of action was barred by the statute of limitations, as appeared by the declaration. The court sustained the demurrer, and dismissed plaintiff's case, and the plaintiff excepted, and error thereon is assigned.

The gist of this action is the misconduct of the defendant. When a person who wishes to purchase lands, retains an attorney to examine the titles, and such attorney reports to his client that the titles of the person from whom he wishes to purchase are good, and it would be safe to make the purchase, and the attorney makes a false report to his client, he is guilty of a breach of duty, and a right of action immediately accrues to the client; if no special damage or injury has resulted to the client, then he may, nevertheless, recover nominal damages; if special damage result from the misconduct of the attorney, it is not of itself a cause of action, but the breach of duty imposed by the contract is the cause of action, and not the consequential damage resulting from it. The breach of promise or of duty took place as soon as the defendant reported that he had examined the titles to the lands, and that the same were good and sufficient. And the plaintiff's declaration avers that this breach of duty occurred on the 25th March, 1866, and this action was not commenced until the 26th September, 1881; it follows, therefore, that the statute of limitations is a bar to this action. See *Howell vs. Young*, 5 *Barnwell & Cresswell*, 263, in which this question is ably discussed by Bayley and Holroyd, Justices. In *Rhines vs. Evans*, 66 *Pa.*, 195, it is held that the statute of limitations begins to run in favor of an attorney from the time he collects or receives money for his client, although the client may not

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know it, but find it out afterwards. And upon the point under consideration the cases of *Short vs. MacCarthy*, 3 Barn. & Ald., 626; *Brown vs. Howard*, 4 Moore, 508, may be relied on. See also Weekes on Attorneys at Law, p. 529, §320. This court held in the case of *Crawford vs. Goulden*, 33 Ga., 174, that the statute of limitations commences to run from the time the negligent act was committed by the attorney. And this principle is fully sustained by the authorities referred to above. There was no error in sustaining the demurrer to plaintiff's declaration, and the judgment of the court below is accordingly affirmed.

Judgment affirmed.

ADAMS et al. vs. THE STATE OF GEORGIA.

Where one who was resisting arrest by a constable and his posse, was shot and killed by one of the latter, and, on a prosecution for murder, it was set up, by way of defence, that the deceased was seeking to commit a felony on the constable, or, at least, that the person who fired the shot acted under reasonable fears thereof, under the latter branch of the defence, it was not necessary to show that the killing was actually necessary to prevent the felony, but it would have been enough to have shown that the circumstances were sufficient to excite the fears of a reasonable man that it was the purpose of the deceased to perpetrate a felony upon the officer, and that the accused acted under the influence of those fears, and not in a spirit of revenge

September 11, 1883.

Criminal Law. Charge of Court. Before Judge HUTCHINS. Walton Superior Court. February Term, 1883.

Monroe Adams, Job R. Smith, Charlie Cheatham, Thomas Austin and James Austin were indicted for murder, it being alleged that they killed one Alfred T. Sims, on July 20, 1882.

On the trial, the evidence for the state was, in brief, as follows: The defendants went to the house of Sims to arrest him. Sims had previously stated that he was ready to be tried; had gone to the court-ground for that

purpose, and had but recently returned home when they arrived. A pistol shot was heard ; then some one called out to shoot, and a gun was fired. The wife of Sims, who was from twenty-five to fifty yards away, went at once to the house, and found that her husband had been shot by Adams. Smith had hold of her husband, and was pulling him around. Sims said to Smith that the latter should not have had him shot, as he was not trying to get away, or trying to shoot Smith. Smith responded, "Yes, you were." Sims said that he was a dying man; did not expect to live an hour, and would not tell a lie; that the pistol went off in Smith's hand, after the latter took it from him; that Monroe Adams shot him. Smith said, "Monroe Adams ought not to have shot you. I did not tell him to kill." Adams said, "Yes, you did tell me to shoot, and I shot him." Sims said to Smith, "Job, you came here to kill me; you did not come for anything else," and Smith responded, "Didn't you say you would kill me, if I came?" Sims denied having said so, and asserted that what he did say was, that if Smith or any one else came rightly, he would treat them rightly. Sims also said that he did not think that Smith had any right to run in on him and try to shoot him, after he had been arrested and been to the court-ground in the evening. Adams and Cheatham had guns, Smith had a stick. No pistol was seen, except one which Smith produced from his pocket, showing that one barrel had been fired. Sims made other statements before his death, to the effect that his pistol had fired accidentally, and that the ball would be found in the joist; and on searching, it was so found. Austin had stated in conversation, since the homicide, that Smith instructed the party, before they reached the house of Sims, to shoot; that is, if Sims resisted, to defend themselves.

The evidence on behalf of the defence showed, in brief, the following facts: Sims and one Joe Smith were on bad terms, growing out of an attempted outrage, which Sims charged that Joe Smith tried to perpetrate upon his little

girl. Joe Smith swore out a warrant for assault with intent to murder; also a peace warrant. These warrants were placed in the hands of Job R. Smith (who was a constable) for the purpose of making the arrest. Sims had announced that he was ready for trial, but that he would not be arrested, and would kill the man who tried to arrest him. His threat of violence was communicated to the constable, who was somewhat loth to undertake the arrest, but the magistrate informed him that he considered it his duty to do so. He thereupon received the warrant, and summoned the other defendants as a *posse* to aid him in making the arrest. He remarked that he thought that, by humoring Sims, he could manage him. On the way to the house of Sims, they borrowed a rifle and a shot-gun. On reaching the house, Smith instructed two of the *posse* to accompany him inside, and told the other two to go to the back door and window. Smith, accompanied by Cheatham and James Austin, entered the house. Smith looked around and said, "He ain't here." Just then Sims stepped out of the dining-room door, with his hand in his pocket. Smith bade him good evening, but he did not reply. Smith then informed him that he had come to arrest him on two warrants, stating the offences charged, and asked him if he had been arrested. He replied, that he had not, and, with an oath, that he never intended to be. Smith told him that if he would give up, he would be treated rightly, and that he (Smith) was taking no stand against him. Sims jerked out a pistol, and, with an oath, said that he would blow Smith's brains out. Smith told him not to shoot, but he leveled the pistol at Smith's head. The latter stepped forward, and tried to knock up the weapon. Sims fired, cutting a hole through the brim of Smith's hat; Smith thereupon grabbed him, and a struggle ensued. Sims pulled out another pistol, and fired a second shot. He had Smith bent over at the time. When he did this, Adams fired upon him with a shot-gun, and the two fell to the floor together. After the fall, Smith took a pistol from Sims,

which was cocked. Mrs. Sims then came into the house, and inquired who had killed her husband. Adams said he had shot him, because the latter had shot Job Smith.

There was some other testimony tending to impeach witnesses, and relating to minor details, not material here.

The jury found the defendants, Smith and Adams, guilty of involuntary manslaughter, in the commission of a lawful act, without due caution and circumspection. They moved for a new trial on various grounds. Only one of these was considered by the Supreme Court, namely, the giving of the charge set out in the decision.

H. D. McDANIEL; J. W. ARNOLD; B. J. EDWARDS; A. S. ERWIN, for plaintiffs in error.

A. L. MITCHELL, solicitor general, by HARRISON & PEEPLES, for the state.

BLANDFORD, Justice.

The court below, among other things, charged the jury, "If you believe from the evidence, at the time of the killing, deceased, Sims, manifestly intended, by violence or surprise, to commit a felony upon the officer while engaged in the proper performance of his official duty, and the circumstances, as they appeared to Adams, were sufficient to excite the fears of a reasonable man, and that he believed that it was necessary to kill him to prevent the felony, and he acted under the influence of those fears and belief, and not in a spirit of revenge, and he killed Sims, and the killing was necessary to prevent the felony, it would be justifiable homicide." This charge would have been right and in accordance with the Code, if the court had left out the words, "and the killing was necessary to prevent the felony;" with the addition of these words, the charge was erroneous. The Code does not make it necessary, under the circumstances of a case like this, that the killing was necessary to prevent the felony; all that the Code requires is,

Commissioners of Pilotage of St. Simons, etc., w. Tabbott, and *vice versa*.

under circumstances like these, that the circumstances were sufficient to excite the fears of a reasonable man that it was the purpose of the deceased to perpetrate a felony upon the officer, and that the accused acted under the influence of those fears, and not in a spirit of revenge. It does not have to appear that the killing was necessary to prevent the felony, but only that the circumstances were sufficient to excite the fears of a reasonable man, and that he acted under those fears, and not in a spirit of revenge.

There were other rulings and decisions of the court excepted to in this case, which are not here considered, as they may not occur on another trial; but it must not be inferred that they are approved by this court.

Judgment reversed.

COMMISSIONERS OF PILOTAGE OF ST. SIMONS, etc., *vs.* TABBOTT, AND *vice versa*.

1. Where a pilot was tried before the commissioners of pilotage of the port of Brunswick, on certain charges against him for dereliction of duty, and after a conviction, an appeal to the superior court was taken, and on the trial before a jury in that court he was acquitted, the commissioners could not move for a new trial, and upon its refusal, prosecute a writ of error based on such refusal. Proceedings against pilots for dereliction of duty are criminal proceedings, or *quasi* criminal proceedings, and a judgment in favor of the defendant cannot be reviewed.
2. Where a case has been tried before an inferior court, and from its judgment an appeal has been taken to the superior court, the members composing the inferior tribunal are not parties to the case pending on appeal, and cannot prosecute a writ of error in their own names to reverse the judgment rendered on the appeal.
- (a.) In a proceeding against a pilot for a dereliction of duty, the commissioners are no parties thereto, except as representatives of the state, and they can make no motion for new trial, nor can they take a writ of error in their own names.

December 21, 1883.

Criminal Law. Practice in Supreme Court. Pilots.

Commissioners of Pilotage of St Simons, etc., vs. Tabbott, and *vice versa*.

Parties. Former Jeopardy. Before Judge MERSHON.
Glynn Superior Court. December Adjourned Term, 1882.

Reported in the decision.

C. P. GOODYEAR; SYMMES & ATKINSON, for the commis-
sioners.

HARRIS & SMITH, *contra*.

BLANDFORD, Justice.

Certain charges having been preferred against Tabbott for dereliction of duty as pilot, he was tried before the commissioners of pilotage for the port of Brunswick, and found guilty, and, by their judgment and sentence, deprived of the office of pilot. He presented his petition to the judge of the superior court for an appeal to the superior court, which was granted; and on the trial of the issue before a jury in the superior court, he was acquitted of the charge preferred against him. The commissioners moved for a new trial, upon several grounds. The court dismissed the same on several grounds, among which was the ground that the case against Tabbott was in the nature of a criminal proceeding. To this ruling of the court the commissioners excepted, and this writ of error is presented to review and reverse this judgment of the court below. The Code, sections 1504 to 1542, inclusive, Cobb's Digest, 33, contains the statute of this state in relation to the subject of pilotage for the port of Brunswick. It provides for the appointment of pilots, their trial, and the offences for which they may be tried, and their punishments. It also provides for an appeal to the superior court in certain cases, by the order of the judge of the superior court, upon petition for that purpose, and provides that, upon such appeal, an issue shall be made up and tried by a special jury.

In the first instance, the trial is to be had by and before

Commissioners of Pilotage of St. Simons, etc., vs. Tabbott, and vice versa.

the commissioners of pilotage provided by the statute; from the judgment of the commissioners, an appeal may be taken by the pilot, as above stated. In this case, the pilot was tried by the commissioners, and found guilty, and deprived of his office of pilot; he presented his appeal to the superior court, and upon trial before that court, he was acquitted, and restored to his office of pilot.

Is this case a *quasi* criminal case, or in its nature a criminal case, so as to prevent a review of the judgment in favor of the defendant? We think so. The commissioners of pilotage, under the statute as to the trial and punishment of pilots, are a court exercising punitive powers, fines and suspension, and removal from office. As a court, they represent, in this respect, the justice and sovereignty of the state. The pilot is allowed a rehearing by appeal to the superior court, another tribunal, which represents the justice and sovereignty of the state, and when acquitted by this appellate tribunal, there is no further appeal.

The commissioners of pilotage are no parties to this case; when the appeal was allowed by the judge of the superior court, and the superior court acquired jurisdiction of this case, all right or power of the commissioners over this case ceased and determined; and even if this were not a criminal proceeding, these commissioners are no parties to the same, except as representatives of the state. They can make no motion, nor can they prosecute a writ of error in their names to review the proceedings had before the superior court; it would be to allow an inferior tribunal, which had lost jurisdiction of a case by an appeal to a superior court, to prosecute a writ of error in its name, to reverse the ruling of the appellate court. This is what is attempted here. The commissioners of pilotage must be satisfied with, and obey, the judgment of the superior court of the county of Glynn.

Judgment affirmed.

Cross-bill of exceptions dismissed.

Bagwell vs. Bagwell.

BAGWELL vs. BAGWELL.

1. Any fact showing that a contract is unfair, unjust, or against good conscience, will justify a court of equity in refusing to decree its specific performance.
2. The exercise of the jurisdiction of courts of equity to decree a specific performance or the rescission of a contract, is not a matter of right in either party, but is a matter of sound and reasonable discretion in the court, which governs itself, as far as it may, by general rules and principles, but at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties.
3. Courts of equity will not decree a specific performance in cases of fraud or mistake; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust.
4. A surviving member of a firm was also the administrator of the deceased partner; the firm and its members were insolvent; the firm and the deceased member were deeply involved; the complainant, as executor, sold land as the individual property of the decedent; it was bid off for defendant, who subsequently transferred his bid to complainant, upon condition that complainant would pay him a note which he held against the insolvent firm; a part of this amount has been paid. Complainant offered to complete the contract, and prayed for specific performance:

Held, that the bill was properly dismissed on demurrer. The contract set up would divert assets from the proper course of administration, and be a breach of trust and a constructive fraud. Partnership assets are primarily liable for firm debts, and individual assets for individual debts, in cases of insolvency and death.

September 11, 1883.

Specific Performance. Partnership. Debtor and Creditor. Equity. Before Judge HUTCHINS. Franklin Superior Court. March Term, 1883.

J. M. C. Bagwell filed his bill against A. G. Bagwell, alleging, in brief, as follows: In 1873, J. Madison Bagwell and complainant were merchants in the town of Carnesville, Georgia, under the firm name of J. M. Bagwell & Son. On April 19, 1873, they borrowed from

defendant \$260.00, and gave therefor their note, bearing ten per cent interest. On March 8, 1875, J. Madison Bagwell died testate, leaving complainant as his executor. As such, complainant sold the realty of the deceased, on the first Tuesday in January, 1876. Defendant caused the store-room in Carnesville to be bid in for him for \$275.00. Some days after the sale, defendant went to complainant and informed him that he (defendant) had no use for the store-room, and was unable to pay for it at that time, and offered to let complainant take it from him. Complainant tendered him a deed, but defendant declined to take it for awhile, saying that complainant could hold it, but he subsequently took it. A contract was made between complainant and defendant, to the effect that complainant should pay off the firm note due to defendant, assume the bid of defendant for the house, and that the defendant should thereupon make him a deed. This agreement was very advantageous to defendant, because the firm and both of its members were insolvent; and in the regular course of administration, the individual assets of the deceased member would be first applied to his individual debts, leaving the firm debt due to defendant unpaid. On the day the contract was made, complainant paid defendant \$173.00, and on July 13, 1878, he paid \$25.00 more. Immediately after the contract, complainant took possession of the property, paid taxes and expenses of repairs, and held possession until January 13, 1883. At the time of the contract, property in Carnesville was very much depreciated in value, and complainant would not have remained there at all but for having bought this lot, and would not have rented it at any price. But property has now advanced in valuation, and defendant claims the title to this house, and unless a specific performance is decreed, can eject complainant and hold him liable for rent. He has tendered defendant the balance due on the note, and demanded a deed, but defendant refuses to com-

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ply with the contract. The object of the bill was to compel a specific performance.

Defendant demurred to the bill for want of equity, because there was a complete remedy at law, and because the contract set up in the bill was illegal and contrary to public policy.

The court sustained the demurrer and dismissed the bill. Complainant excepted.

J. T. DORTCH; W. R. LITTLE; S. P. THURMOND, for plaintiff in error.

A. S. ERWIN; B. F. CAMP, for defendant.

HALL, Justice.

Any fact showing that a contract is unfair, or unjust, or against good conscience, will justify a court of equity in refusing to decree its specific performance. Code, §3190. The exercise of the jurisdiction of a court of equity to decree a specific performance, or the rescission of a contract, is not a matter of right in either party, but is a matter of sound and reasonable discretion in the court, which governs itself, as far as it may, by general rules and principles, but, at the same time, which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. Story's Eq., §742.

Courts of equity will not decree a specific performance in cases of fraud or mistake; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust. *Id.*, 769; *Mortback vs. Buller*, 10 Ves., 292; *Ord vs. Noel*, 5 Madd., 438; *Bridges vs. Rice*, 1 J. and W., 74; and numerous other cases cited by annotator in notes to *Woollam vs. Hearn*, 2 White and T. Lead. Cases, pt. 1, p. 876, marg.

This rule embraces constructive as well as actual fraud. *Id.*, American Notes, p. 593, top.

The bill, in this instance, makes this case: The complainant was the surviving member of a firm, and also the administrator of the deceased partner both the firm and the individual members thereof were insolvent; the firm was deeply involved, as was also the deceased member on his personal account; in fact, his estate was wholly inadequate to pay his individual debts. The property in question was sold as the individual property of deceased, by the complainant, as his administrator, and was bid off for the respondent, who subsequently transferred his bid to the complainant, upon condition that the complainant would pay him a note which he held against this insolvent firm. Only a portion of the purchase money, so-called, was paid by complainant, in pursuance of this contract, to the estate he represented; the balance of the same, or a large portion thereof, was paid on the claim held by defendant against this insolvent firm, and was thus diverted from the proper course of administration, the partnership assets being primarily liable to partnership debts, and the individual effects to the personal debts of the members. Code, §1918. That a court of equity will not decree a specific performance of such a contract, is too plain to admit of question or doubt; it would be assisting in a direct breach of trust; would be aiding in a violation of the settled policy of the law, and would be countenancing and upholding a constructive fraud. 9 Paige's Ch. R., 650; *Fleming et al. vs. Foran et al.*, 12 Ga., 594, *et seq.*, especially what is said by Lumpkin, J., on pp. 596, 597, 598, 599.

There was, therefore, no error in sustaining the demurrer to this bill; it was without equity, and showed upon its face that the contract it sought to have specifically performed was in violation of public policy, was founded on a breach of trust, and was, to say the least of it, a constructive fraud.

~~argument~~ affirmed.

Blance & McGarough vs. Mize.

BLANCE & MCGAROUGH vs. MIZE.

1. Where suit was brought and judgment obtained against a sheriff, and the execution issued thereon was directed "to all and singular the sheriffs of this state and their lawful deputies," and was levied by the coroner, and a claim interposed, the claimant could move, at the trial of the case and before issue joined, to dismiss the levy, because it appeared that the coroner had no authority to make the same.
2. Where a *fi. fa.* is issued against the sheriff as such, it should be directed to the coroner of the county of his residence, and to all and singular the sheriffs of the state, except the sheriff of such county; when this has been done, the coroner has authority, without more, to make the levy. Where the *fi. fa.* is not thus directed, and it does not appear on the face of the proceedings that the sheriff is disqualified to act, then, upon affidavit being made of the fact and placed in the hands of the clerk of the court issuing the process, and by him delivered to the coroner, that officer is authorized to make the levy. Without this, he has no authority to execute the process.

September 25, 1883.

Sheriffs. Executions. Levy and Sale. Claim. Coroner.
Before Judge FORT. Sumter Superior Court. April Term,
1883.

Reported in the decision.

HINTON & MATHEWS; HAWKINS & HAWKINS, for plain-
tiffs in error.

GUERRY & SONS, for defendant.

HALL, Justice.

The plaintiffs obtained an execution against J. W. Mize, which was directed, as required by law (Code, §3632), to "all and singular the sheriffs of this state and their lawful deputies." When the suit was commenced, on which this execution issued, Mize was sheriff, and has continued to be sheriff of Sumter county until the present time. On the 20th of August, 1881, the coroner of Sumter county levied

this *fi. fa.* on three bales of cotton in the warehouse of Harrold, Johnson & Co., as the property of "J. W. Mize, sheriff of Sumter county, Georgia," the property was claimed, and upon the trial of the claim, and before issue joined, the claimant moved to dismiss the levy, because it appeared that the coroner had no authority to make the same. The court below sustained this motion, and ordered the levy dismissed, because it appeared by the admission of the parties that no affidavit had been filed, as required by the Code, §588. Exception is taken to this decision, and that exception brings the case here.

1. That the claimant had the right to make this motion, and that it was made at the proper time and in the proper manner, is well settled by the decisions of this court. 58 Ga. 417; 60 *Id.*, 489.

2. We hold that the coroner had no authority to make the levy, and that his action, for the want of such authority, is void. The execution did not issue against Mize as sheriff, but as an individual; had it issued against him as sheriff, then it should have been directed to the coroner of the county of his residence, and to all and singular the sheriffs of the state, except the sheriff of the county of Sumter; in that event, the coroner would have had authority, without more, to make the levy. Code, §3633. Where the *fi. fa.* is not thus directed, and it does not appear on the face of the proceedings that the sheriff is disqualified to act, as is evidently the case where he is a party to the process, then, upon affidavit being made of the fact and placed in the hands of the clerk of the court issuing the process, and by him delivered to the coroner, that officer is authorized to make the levy. *Id.*, 588. Without this, however, he has no more authority to execute the process than any other citizen.

Judgment affirmed.

Anderson vs. The State of Georgia.

ANDERSON vs. THE STATE OF GEORGIA.

1. The showing in support of a motion for continuance, on the ground of the absence of witnesses, should be full, satisfactory and direct, as to the material allegations necessary for that purpose; it should appear that there is no other witness present by whom the defendant can satisfactorily prove the same facts, and that such facts would be evidence in the case.
 - (a.) Continuances of a criminal case, after the first term, rest in the sound discretion of the court; and even at the first term, all discretion is not denied to the judge.
2. The bill of exceptions should specify plainly the decision complained of. An assignment of error that the entire charge is erroneous, is too general, if any part of it be correct.
 - (a.) While confessions of guilt should be received with great caution, and will not, alone, justify a conviction, yet if they should be corroborated by circumstances, they would be sufficient for that purpose.
 - (b.) The charge on the subject of circumstantial evidence and confessions was full, clear and proper.
3. Where the preliminary examination as to the admissibility of confessions was conducted in the presence of the jury, and being found competent, they were admitted, this was not such error as would require a new trial; *aliter*, had the confessions been inadmissible.

January 8, 1884.

Criminal Law. Continuance. Murder. Practice in Superior Court. Before Judge ADAMS. McIntosh Superior Court. May Term, 1883.

To the report contained in the decision, it is only necessary to add, in connection with the third division thereof, that one ground of the motion for new trial was because the court did not cause the jury to retire during the preliminary examination as to the admissibility of the confession. After examining the witness, McGriff, the confessions were held admissible, and were proved, as stated in the decision.

GARRARD, MELDRIM & FRASER, for plaintiff in error.

Anderson vs. The State of Georgia.

C. ANDERSON, attorney general; W. G. CHARLTON, solicitor general, by HARRISON & PEEPLES, for the state.

HALL, Justice.

The prisoner and his brother, Pompey Anderson, were indicted jointly for the murder of Chance Brown. When the case was called, the defendants severed, and the prisoner was put upon his trial. He moved for a continuance, and put his showing in writing, to the effect that Barbara Anderson, and other witnesses subpoenaed for them, were absent without his consent, etc., on account of sickness; that he expected to prove by them that Pompey Anderson was absent from the scene of the homicide at the time it was committed, and could not have participated therein. This showing for a continuance was overruled, and the trial proceeded. The defendant was convicted, and made a motion for a new trial upon various grounds, which was overruled by the court. In this motion was included the judgment overruling the continuance. The evidence upon which the defendant was convicted consisted principally of his own confessions, made to one McGriff, who was confined in McIntosh jail at the time defendant was committed, and who thereafter occupied with him the same cell in the prison. Defendant stated to McGriff that he "would not be there, if it were not for his brother; that Chance had detected Pompey killing his hog, and that Pompey had come to him (Robert) and advised him of the fact, saying they must put an end to Chance; that he (Robert) had then, at Pompey's instance, gone to Chance's house, and asked him if it was true he had said Pompey had stolen his hog. Chance said he had. That he then asked him if he would show him the place where he caught Pompey, and Chance assenting, they thereupon walked to the spot together, Pompey, by arrangement, being stationed there with his gun; that on reaching the spot, he (Robert) struck Chance on the forehead with



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his stick, and Pompey shot him in the head from behind; that they then concluded, from the fact that Patsy had seen Chance and Robert go off together, that they were in a bad fix, and to secure themselves, it was necessary to kill the woman, whereupon it was agreed that Pompey, having killed Chance, Robert should kill Patsy, his wife. In pursuance of this arrangement, they proceeded to Chance's house, and Robert, inserting the gun through a crack, shot her as she sat by the fire.

1. There was no error in disallowing the motion for a continuance, or in refusing a new trial upon that ground. The presiding judge seems to have thought that sufficient diligence had not been shown in procuring the attendance of these absent witnesses, for, in certifying this ground of the motion, he states that the case was sounded some days previous to the trial, with the object, which he then announced, of ascertaining whether everything was in readiness, and, if parties so desired, of having witnesses sent for; that the defendant and his counsel, although present, gave the court no intimation of the absent witnesses, but permitted the case to be marked ready, the court acting under the idea that the defendant was prepared for trial. Whether the court was right or wrong in supposing that there was a want of diligence in procuring the attendance of these witnesses, yet we are well satisfied that the case should not have been postponed because of their absence.

The absence of Pompey Anderson from the scene of this double murder, at the time it was committed, did not account for the prisoner's whereabouts, and did not negative the fact that he made to McGriff the full and circumstantial confession deposed to by him, and, if admissible at all, could have had only a remote bearing upon that issue. The showing did not set forth that the defendant had no other witnesses by whom he could prove the same facts, nor could this requirement of the law have been complied with, as the prisoner, on his trial, introduced at least three other witnesses who testified to substantially the same

facts. In *Allen vs. The State*, 10 Ga., 85, this court held, that the affidavit for a continuance should be full, satisfactory and direct as to the material allegations necessary for that purpose, and should state that there is no other witness present by whom the party can satisfactorily prove the same facts. It should appear, further, that the facts expected to be proved would be evidence in the case.

This indictment was found at the May term, 1881: the trial did not take place until the May term, 1883, of the court. By the Code, §4647, every indictment stands for trial at the term of the court at which it is found, unless the absence of material witnesses or the principles of justice should require a postponement of the trial: then the court is required to allow such postponement to the next term. Subsequent continuances would seem to rest in the sound discretion of the court. *Griffin vs. The State*, 26 Ga., 498, 500.

The court, in the first case, is required to grant the continuance for the specified cause; in the last case, however, it has "power" to do so. But, although required to grant the continuance for the absence of material witnesses at the term when the indictment is found, the judge is not even then deprived of all discretion in the matter, as appears to have been ruled in *Malone's case*, 49 Ga., 215.

It was urged by the prisoner's counsel in this case, that the witnesses sworn accounted for the absence of Pompey Anderson from the place of the homicide only for a portion of the time covered by the transaction, and that the absent witnesses, if present, would have made complete proof of the *alibi* as to him. This is not apparent from the statement made in the showing for a continuance; and from what is developed in the evidence on the trial, it seems highly improbable that any satisfactory account could have been given of him by these witnesses during that alleged interval; for it appears that during all the time these witnesses were in company with some of the witnesses who were actually sworn on the trial. When

the motion for a new trial was made, these absent witnesses were accessible ; their affidavits could have been obtained and made a part of the motion, and if the prisoner had suffered injustice or oppression for the want of this evidence, the fact could, in that way, have been made to appear. But no attempt was made to procure their affidavits, and their absence is a potent fact, justifying the conclusion that the witnesses could not have satisfactorily accounted for Pompey during the interval in question. We can perceive no abuse of the discretion of the court in overruling this motion for a continuance, and will not undertake to control its exercise, unless it has been abused, or has resulted in oppression to the accused. This is the well settled rule of the court. Code, §3531, and cases cited thereunder.

2. The 2d and 3rd grounds of the motion for a new trial, and the first ground of the amended motion, relate to the same subject, and may be considered together.

They assert that the verdict is contrary to law and evidence, and without evidence to support it, and that the entire charge of the court, which is set out at length, is erroneous. There is no assignment of error upon any portion of this charge, save the sweeping one above stated. This practice has never been sanctioned by this court. We could not do it, if we would, for the law requires that "the bill of exceptions shall specify plainly the decision complained of, and the alleged error." It is unnecessary to cite the numerous cases on this point ; they are uniform, and we fail to find one that departs, even remotely from the long and well-established rule, which is co-eval with the court itself.

It was frankly admitted by the able counsel for the prisoner that, if his confession was to be credited, by being sufficiently corroborated, and if it was uncontradicted in other respects and by other testimony, then the verdict of the jury was sustained by the evidence. Notwithstanding the view presented by them with so much earnestness

and plausibility, we are constrained to say, that a confession so clear, positive, direct and circumstantial, and one so fully corroborated by the independent facts and circumstances attending the homicide, as proved by other witnesses, has rarely come under our observation. To quote the words of the solicitor general, "it gave the motive, the manner, the results, and the precautionary efforts to conceal the crime, with circumstantial, plausible and reasonable detail." Pompey, it seems from this confession, was apprehended in stealing the hog he had killed, and which belonged to deceased. By other testimony, it appeared that, at the house of the latter, in his ox-cart, in which he had that day been to Darien, and in which he was seen on his return to his home, this ox, still fastened to the cart, was found hitched to the fence before his door, and in the cart was a dead hog, killed by a gun-shot wound, and having its ears cut off. This mutilation, it is reasonable to suppose, no one but a thief could have any adequate motive for making. The dead man's body was found in the woods, a short distance from his own house, and also from the house of prisoner. When it was found, he was lying on his face with a gun-shot wound in the back of his head, given at such short range that the hair was singed, and that the buckshot entered his head in a lump, making a single broad and ghastly wound, and on his forehead was a gash a half inch deep and from two to two and a half inches long. Inside the house, Patsy, his wife, was found on the floor dead, with a gun-shot wound in her head. These are a few of the prominent facts in the case, proved by other witnesses than the one who gave evidence of the confession. Now, compare these facts, and others of a more minute and less prominent character, as testified to by independent witnesses, with the confession as detailed, and bear in mind that the witness speaking of the confession was a stranger at the place, and had no knowledge of the locality, nor of the persons engaged, and could have known nothing of the circumstances attending this awful tragedy, and we think little room

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is left to question the propriety of this conviction. The recommendation that the defendant be imprisoned for life in the penitentiary, was a high tribute to the skill and ability of the counsel who defended him. According to the confession, the first blow was struck by prisoner on the forehead with a stick; according to the other witnesses, the prisoner was the owner of the stick, which he habitually carried, and which was shown at the inquest, having a freshly made crack in it, and on it a dark spot. The deceased, as has been seen, had on his forehead such a wound as would be made by such a stick. From the effect on the stick, and the character of the wound on the forehead, the blow must have been given with great force; it was, at least, sufficiently heavy to fell the deceased.

The confession stated that the gun-shot wound was given last, and at short range. This is evidently true, since the entire load of buckshot entered at a single aperture, and the hair on the scalp at the spot it entered was burned. The position of the dead man, lying on his face, indicates that the wound which finished him must have been given after he was knocked down.

The confession states, that after the murder, it was suggested that the wife of the dead man would be a witness against them, and to prevent this, prisoner had slain her. This is strongly corroborated by the fact that she was found dead in her house, with a gun-shot wound in her head, indicating clearly that she had been assassinated for the reason given, and in the manner stated by the confession.

The various particulars in which this confession has been substantiated by other evidence, show the strong improbability of its having been fabricated by the witness, McGriff. Considering his absence at the time, and the fact that he was entirely unacquainted with the parties and the locality; knew nothing of their relation to each other, and was an utter stranger in the neighborhood, his narrative shows ingenuity truly wonderful, and no mean knowledge of the requirements of criminal law. This witness was an un-

lettered and ignorant colored raft-hand, and could not, as it seems to us, have been instructed in details so minute and important, otherwise than he stated.

Now, how was this damaging evidence met? The defence attempted to show that he was present at the coroner's inquest, where he obtained a knowledge of these circumstances; this he emphatically denied. The evidence introduced to disprove this denial, is, to say the least of it, highly improbable, if it was not successfully impeached; at all events, there was a conflict of evidence upon this point, and the jury, after weighing the evidence, chose to believe the state's witness. This was their undoubted privilege, and the judge who tried the case, upon a review of all the facts on the motion for a new trial, was satisfied with the conclusion to which they came, and so far from abusing the sound legal discretion with which he is wisely invested, we concur in opinion with him, that the verdict should stand. We think, as we have before intimated, that the conviction was proper.

There is not a doubt that the *corpus delicti* was established. Murder most foul was evidently committed; the only question to be decided was as to the perpetrator. The prisoner declared that he and another were the guilty agents. Was his voluntary confession to be credited? While it is true that confessions of guilt are to be received with great caution, and that they will not alone justify a conviction (Code, §3792), yet, if they should be corroborated by circumstances, they would be sufficient for that purpose. 45 Ga., 53; 65 Id., 152; 63 Id., 339.

The charge given in this case upon the subject of circumstantial evidence and confessions, distinguishing between the two, and as to the amount of evidence required to convict in such cases, was clear, explicit and proper; it was just what it should have been. This much we say in response to the criticisms made upon it in argument. The inability of the defendant's learned counsel to point out

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specifically the errors alleged to be contained in it, is its best vindication.

3. There was no error in conducting the preliminary examination as to the admissibility of confessions in the presence of the jury, inasmuch as the testimony was found to be competent and was admitted. This would have been error had it been rejected. *Hall vs. The State*, 65 Ga., 36; *Jones vs. State, Id.*, 506.

Judgment affirmed.

MARKHAM vs. HUFF.

1. The system of bringing before the Supreme Court for review the judgments of a chancellor granting injunctions, by what are called "fast" bills of exceptions, is different from the ordinary system of excepting to final judgments. Expedition is of the essence of the former, and they are not governed by the ordinary rules controlling the latter as to entering on the docket of this court, the time of hearing and the like. And the acts of 1870, 1877, regulating practice in ordinary cases, do not apply to these extraordinary cases, save that by the act of 1880 provision is made in regard to these cases in the event of the death of the presiding judge.
 - (a.) Where the record and bill of exceptions in an injunction case were not transmitted to the clerk of the Supreme Court by the clerk below within fifteen days from the service, the case must be dismissed.
2. One of the counsel for plaintiff in error obtained the record and bill of exceptions from the clerk of the Supreme Court, as the latter thought, for the preparation of his case; the attorney delivered the bill of exceptions to plaintiff in error, who carried it to a printing house and delivered it to the printer, in order to have certain portions of it printed as an abstract; the printer divided the bill of exceptions into numerous parts, and distributed it among various typographers; in order to indicate certain parts which were not to be printed, the printer drew lines across those portions with a blue pencil. When counsel for defendant in error desired the papers, the clerk called upon counsel for plaintiff in error for them; the bill of exceptions was put together and returned; one sheet appeared to have been mutilated, but it did not appear how this occurred; the bill of exceptions had upon it the printer's marks; but it had not been otherwise altered than as stated. These facts

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appeared from affidavits, together with a disclaimer of any intention to violate any rule of this court:

Held, that the writ of error must be dismissed.

(a.) This court will not impute intentional wrong to counsel or his client in this case, and, therefore, will not go further than to dismiss the case.

(b.) The rule of court forbidding records to be taken from the clerk's office without leave of court, will hereafter be enforced.

October 19, 1883.

Injunction. Practice in Supreme Court. Attorney and Client. Records. Before Judge SIMMONS. Bibb County. At Chambers. June 20, 1883.

Reported in the decision.

E. N. BROYLES ; C. ANDERSON, for plaintiff in error.

LYON & GRESHAM ; W. A. HAWKINS, for defendant.

JACKSON, Chief Justice.

A motion was made to dismiss the writ of error in this case, on two grounds: First, that the clerk of the superior court had not transmitted the bill of exceptions, and a transcript of the record to this court, within fifteen days of the service of the bill of exceptions, as required by the 3213th section of the Code. And, secondly, because the bill of exceptions, after it reached this court, had been procured from the clerk by Mr. Broyles, of counsel for plaintiff in error, for the purpose of preparing his abstracts and briefs, as the clerk understood, but had been turned over by him to his client, the plaintiff in error, and by him delivered to a printer, who had divided it out among his journeymen printers, and thus, in separating the sheets and handling it for printing, it had been defaced; that some lines were obliterated, and cross marks in blue pencil had been drawn across many pages of the record from corner to corner, so that the bill of exceptions and transcript, as it came from the court below, under the certifi-

cate of the clerk, could not well be recognized in the blurred and marked and defaced paper now in court, and said to be the same.

1. The first ground of the motion appears to us to be well taken.

It has been frequently held by this court, that the class of cases which are brought here for review by what are termed fast bills of exceptions, are distinct from those brought here from final judgments, and that the laws applicable to the ordinary writs of error are not applicable to them; hence, that the act of 1877, codified in sections 4272 (d), (e), (f), (g), is not applicable to such writs of error, and that absence from home of the judge, or any other reason for failure to sign and certify these fast bills within the twenty days allowed by law, will not remedy the objection as to these fast bills. See 60 *Ga.*, 315; 62 *Id.*, 209; 63 *Id.*, 308; 66 *Id.*, 244, 353. These cases are conclusive, that under section 3213 of the Code, no excuse would prevail to hold the case here, if a fast bill, unless signed and certified in twenty days. It is true, that in 1880 an act was passed to remedy this hardship in case of the death of the judge; but in other misadventures, it would seem that this act made no alteration in the law, as ruled by this court, in reference to the judge's certificate. See Code, §3213 (a).

The duty of the clerk to make out a transcript and transmit it immediately to this court, if in session, and if not, to the next session, within fifteen days, is just as imperative as is that of the judge to sign and certify within twenty days allowed him. The necessity of the one officer making dispatch in speeding this fast bill, is as imperative and overruling and essential as the necessity of the other doing so. See Code, §3213, which declares, that "the bill of exceptions shall be tendered and signed within twenty days from the rendition of the decision, and the opposite party be served within fifteen days from such signing, with the bill of exceptions, and the clerk shall, within fifteen days, make out a transcript of the record, and transmit the same

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immediately to the Supreme Court, if in session, and if not in session, then to the very next session; and its arrival by the first day of the term, or at any time thereafter during the term, shall be sufficient to insure a hearing."

Now, look at the act of 1877, and see what it provides, in Code, §4272(d), and how clearly it appears that the general assembly was dealing only with the regular cases and bills of exceptions, and not the irregular and fast bills. After enacting that no case shall be dismissed, etc., by reason of failure of the clerk of the superior court in transmitting the bill of exceptions and copy of the record, follows this proviso: "Provided the bill of exceptions and copy of the record in such cases shall reach the clerk of the Supreme Court before said court shall have finished the circuit to which said case belongs; but said case must be entered by said clerk of the Supreme Court on the docket of cases from the circuit to which it belongs, and be heard by the Supreme Court at the term to which it should have been returned after all the cases on the entire docket for that term have been heard;" and then the clerk shall give counsel notice, etc.

What lawyer ever heard or imagined that an injunction, or other fast bill case, was put to the heel of the entire docket, if it did not get to the clerk of this court in time to be regularly filed? Who does not know that they start here often after their docket is concluded, and are set for trial, and do not wait for the heel of the entire docket? The act of 1870, which provides for the transmission and trial of injunction and other fast cases, is wholly inconsistent with the act of 1877; and the latter act was never designed to amend or alter or impair its efficacy as a quick traveler to settle the issue made without delay, in order to prevent the ruinous consequences of delay in many cases. If any one who doubts will look at our docket, he will see the memorandum of the clerk of this court, to the effect that cases out of time are set to the heel of the entire docket, under that act of 1877, and counsel notified,

and such entry in regard to injunctions, etc., is nowhere seen. Such has always, since the passage of that act, been the construction of it and practice under it. Nor are we aware of any other act that alters or negatives this ruling. The act of 1870, codified in the 4272d section of the Code, was passed in respect to regular cases. It was to correct evils in regard to them. The act providing for fast bills was not in existence when it passed the two houses. That for fast bills, and this for remedy as to the transmission of regular cases, were approved the same day by the governor, section 4273—a part of the same act—shows to what cases it applied.

We are of the opinion, therefore, that the writ of error should be dismissed on the first ground.

2. But however that may be, it must go out on the second ground. The twenty-fourth rule of this court is explicit. It declares that “no paper belonging to the clerk’s office shall be taken therefrom without leave of the court, and when such leave is granted, the party receiving papers shall receipt to the clerk for the same.” No leave was given to withdraw this record; but the clerk states, on oath, that, under the practice authorized long ago by the Judges of the Supreme Court, to the effect that the rule, as to withdrawal of papers from the clerk’s office, be relaxed, so far as to allow counsel to have them to prepare for argument, that he allowed Mr. Broyles to withdraw them for that purpose; that defendant’s counsel wanted to see them; that he wrote to Mr. Broyles for them; that, in reply, said Broyles returned a part of the transcript, with a note stating that the other papers were in the hands of the printer, and would be returned as soon as possible; that he handed the reply to defendant’s counsel, and then called on Mr. Broyles personally, and requested that all the papers be returned immediately; that Mr. Broyles disclaimed any intention of violating any rule of court by sending said papers to the printer, and agreed to return them without delay; that there were various words, numbers and lines

in pencil on said bill of exceptions when returned to him, which were not there when the papers were delivered to Mr. Broyles.

Mr. W. H. Scott states, on oath, that William Markham (who is the plaintiff in error) brought to him, at his office on Alabama street, the original bill of exceptions and transcript of the record in the cause of William Markham vs. William A. Huff, for the purpose of having the same printed; that after agreeing on terms, the papers were left with him; that he did not know they were papers or records belonging to the Supreme Court, or that there was any particular reason why they should be treated by the printers otherwise than any common manuscript, or more care taken of them; that certain parts he was told not to print; that he drew lines with his blue pencil across and through these, as they now appear; that the fastenings were taken out and the different parts of the whole transcript were placed in the hands of different printers, and by them set up; that he then put them together just as they were; that parts of the bill of exceptions were distributed to the printers to put in type, and were being used for that purpose when Mr. Broyles came in and recalled the papers, and deponent got the several parts of the bill of exceptions, those printed and those not printed, and put them together just as they were, and returned them to Mr. Broyles, and the balance of the printing was done from copies sent to his office by Mr. Broyles; that no changes or alterations were made in the papers beyond what is stated; that some of the papers appear to have been torn and mutilated, but he cannot state how this occurred, that if he had known they were important court papers, he would not have made marks on them; that he had about a dozen men at work on the business, as the work was required to be done in a great hurry; that he did not have control of the papers more than a day or two.

Neither of the present bench of this court is aware of any relaxation of the rule of court referred to by the clerk,

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as it was long ago, probably before either of them came upon the bench. It will not be relaxed hereafter. But the relaxation mentioned by the clerk could not possibly have extended to such hawking about of the records of the court as this testimony exhibits. It extended only to the use of the original papers to prepare the case for argument, according to the understanding of the clerk, and that officer seems to have been as much astounded as this court was, when he ascertained that counsel, to whom he had entrusted records in his official custody for one purpose, had perverted them to another and wholly different purpose; for he went in great haste to see Mr. Broyles about it, and Mr. Broyles seems to have gone with equal haste to see the printer, and to do what he should have done before—recall the original, and furnish copies for print.

The attorney general, in arguing the case before us, with the candor and fairness which distinguish him, did not attempt to justify, hardly to extenuate, a proceeding which must shock the whole profession, as outside of all law and subversive of all purity in practice. It is not meant that Mr. Broyles would deliberately do wrong, or that there would be any danger of his altering or conniving at the alteration of any record of any court; nor is it meant that his client, Mr. Markham, would stoop to such means for success in a case; but it is believed that the Lord's prayer, "Lead us not into temptation," is an invocation which all men, however honest and incorruptible, need frequently to address to the Throne of Grace. At all events, the law so looks upon all humanity; it recognizes the fall common to the race, and it does not put it in the power of one side of a case to ruin the other; therefore, it will entrust its records to neither side.

Nor do we understand, as was argued by counsel before us, that the Supreme Court of the United States adopts a different rule. True, it has its records printed, but the printing is done under the supervision of its

clerk, who stands indifferent between the parties. This court would be delighted were our legislature liberal enough with the money of the people to allow us to adopt a similar rule, and have our records printed, under the supervision of our clerk. It is true, too, as was argued, that our opinions are printed; but that is under the supervision of our reporter, and after the case is over and the judgment rendered, and there can be no temptation to do wrong. It is true, too, as was insisted, that the acts of the general assembly are printed; but that is done by the public printer under bond, and an officer of the state as to that business, and with no temptation to err.

It was also urged before us by Mr. Broyles, that the practice was common of thus turning our records over to clients by counsel and distributing them to printers, and not informing the printers that they are important court papers, and to be careful not to mutilate or mark them; or perhaps that it was common for counsel to entrust the original records of this court to printers, to print such parts of them as were pointed out. We were not aware of such a practice. It is a very bad practice. It is a practice that must cease.

But it is useless to press argument in such a case. The mere statement is enough to condemn what has been done, in all just minds; and that it may not again be repeated, to justify the court in dismissing this case. The first duty of a court is to preserve the purity of its practice and the sanctity of its records. This is of more consequence than the private interests of any man or any number of men. This cannot be done, if the records of courts, in the emphatic language of Judge Warner, are allowed "to be hawked about," at the will of any party to any cause.

The charity "that believeth all things" for the best, (in addition to their character for integrity) casts its broad mantle over Mr. Broyles and Mr. Markham, and will not impute to either any wrong intent in this most unheard-of proceeding with original court records. nor will it per-

Smith vs. The State of Georgia.

mit the court to conclude that any contempt of its authority was actuated either. Therefore, it will not proceed beyond the very mild judgment of dismissing the case, the record of which has been by their agency badly picked to pieces, illy assorted together, obliterated in a few lines, blue cross-marked on many pages, and polluted all over with unofficial and therefore unsanctified hands.

Writ of error dismissed.

SMITH vs. THE STATE OF GEORGIA.

1. Where a witness for the state in a criminal case testified on the committing trial, but at the time of the trial in the superior court is in a foreign state and inaccessible, his testimony given in the committing trial may be proved by any one who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies; and this may be shown by parol, although it has been reduced to writing under the order of the committing court.
2. Exception may be taken to any decision, sentence or decree of the court below; but remarks of the court to counsel, by way of remonstrance or rebuke for their conduct, form no ground of exception.
3. A new trial will not be granted because of the discovery of merely cumulative evidence.
4. The verdict is supported by the evidence, and in accordance with law.

October 9, 1883.

Witness. Evidence. New Trial. Criminal Law. Practice in Superior Court. Practice in Supreme Court. Before Judge WILLIS. Muscogee Superior Court. May Term, 1883.

Smith was indicted for assault with intent to murder, alleged to have been committed on one Kimbly. On the trial, the jury found the defendant guilty, with a recommendation to mercy. He moved for a new trial, on the following among other grounds:

- (1.) Because the court admitted testimony of witnesses

to show that Kimbly was detained as a prisoner in the coal mines of Alabama at the time of the trial.—Objected to as hearsay, and because the record of his conviction and sentence was better evidence.

(2.) Because the court admitted testimony of witnesses to show what Kimbly swore on the committing trial of defendant for this offence.—Objected to as hearsay, because the defendant should be confronted with his witnesses, and because the testimony at the committing trial had been taken down in writing, and this was better evidence than parol.

(3.) Because the court committed error in the following remarks to defendant's counsel, in presence of the jury, upon the admission of A. L. Newberry's testimony: Question: "Well, Mr. Kimbly was in jail here once, was he not?" Answer. "Yes, sir." By the court: "That question has been answered; we have got to try this case to-day. He had just answered that not two minutes ago. You must proceed with the evidence, and get at the testimony that is material." [The court added the following note to this ground: "This statement was made by the court, because the question had been asked and answered before; and to save time, that being Saturday, and the court not desiring to hold the jury over Sunday."]

(4.) Because of newly discovered evidence. [This was cumulative.]

(5.) Because the verdict was contrary to law and evidence.

The motion was overruled, and defendant excepted.

A. A. DOZIER; C. J. THORNTON, for plaintiff in error.

T. W. GRIMES, solicitor general, by J. M. McNEILL, for the state.

BLANDFORD, Justice.

The main question in this case is as to the admission of the testimony of Kimbly, the prosecutor, which had been

given in before the court of inquiry, it being shown that the witness was in the state of Alabama, without the jurisdiction of the court, and not accessible, over the objection of the defendant.

The Code, §3782, provides as follows: "The testimony of a witness since deceased or disqualified, or inaccessible for any cause, given under oath on a former trial, upon substantially the same issue, and between substantially the same parties, may be proved by any one who heard it, and who professes to remember the substance of the entire testimony, as to the particular matter about which he testifies." If this question were *res integra*, I should hesitate before giving my sanction to the admissibility of this testimony, under the clause of the Code quoted above. It is much to be doubted if a "former trial," mentioned in this section of the Code, means a trial before a committing court. But this is settled in the case of *Robinson vs. The State*,* decided March 7th, 1882; and following this latter decision, the judgment of the court admitting this testimony was no error, notwithstanding it had been reduced to writing under the order of the committing court, as the section of the Code above referred to provides, the same "may be proved by any one who heard it, and who professes to remember the substance of the entire testimony," etc.

2. The next error complained of is, that the presiding judge remarked to counsel for defendant, "that the question had been answered; we have got to try this case to-day; the witness has just answered that, not two minutes ago; you must proceed with the testimony, and get at the testimony material." Code, §4250, provides that exceptions may be taken to any "decision, sentence or decree of the superior court." The remark of the judge to counsel is neither a decision, sentence nor decree of the court; and hence no exception can be taken thereto. The judges of the superior courts of this state are charged by law with the execution or administration of the laws, within their

*88 Ga., 833.

Marion vs. Hoyt et al., for use.

respective jurisdictions, and what they may say to counsel engaged in causes before them, by way of remonstrance or rebuke for their conduct before the court, forms no ground of exception that can be reviewed by this court. If the parties are aggrieved by the acts and conduct of the judge in this regard, another tribunal, and not this, must afford them relief.

3. It is claimed by plaintiff in error that he has discovered testimony, since the trial of the case, which is material. In looking into this ground, and the testimony which it is claimed has been discovered, the same is merely cumulative and impeaching. This is no ground for a new trial.

4. The verdict is supported by the evidence, and is in accordance with the law. And the judgment of the court, refusing the new trial, is affirmed.

Judgment affirmed.

MARION vs. HOYT et al., for use.

While one is the owner of land, what he says and does in respect to fixing the boundary thereof may be proved, and his agreements in respect thereto will bind subsequent purchasers from him; but after an owner of land has parted with his title, his subsequent sayings and acts cannot be proved to bind his prior grantees or one holding under him.

February 2, 1884.

Title. Evidence. Admissions. Before Judge HAMMOND. Fulton Superior Court. April Term, 1883.

Reported in the decision.

SPRAIRS & SIMMONS; J. C. HENDRIX, for plaintiff in error.

J. L. CONLEY; JACKSON & KING, for defendants.

Marion vs. Hoyt et al., for use.

BLANDFORD, Justice.

This was an action to recover a certain tract of land in the city of Atlanta.

It was admitted that Lemuel Dean was the original owner of the land sued for. Plaintiffs introduced a deed from Lemuel Dean to Hammond Marshall, dated May 2, 1863; also a sheriff's deed to S. B. Hoyt and John R. Wallace, reciting that the land had been sold under execution against Marshall, dated 3d of May, 1870, and closed.

Defendant introduced a deed from Lemuel Dean to Thomas M. Dean, dated March 17th, 1863, proved that Thomas M. died shortly thereafter, leaving an infant son, Thomas W. Dean, his only heir-at-law, surviving him; also a deed from Thomas W. Dean to S. Marion, the defendant, dated January, 1880.

The plaintiffs introduced one Bass, who testified that he was city engineer; that he made a survey of this land in 1869; that Lemuel Dean was present at the time, and that he agreed that the southeastern boundary of the land was 299 feet from Simpson street, as marked out in the plat made by him; to this testimony defendant objected. The same was admitted by the court, over the objection of the defendant. The court charged the jury, among other things, that where the boundary lines of land were doubtful, that the jury might look to and consider what the owners of the land at the time said and admitted as to the true boundaries in determining the same.

The jury found for the plaintiffs all the land sued for.

Defendant moved for a new trial, alleging as error the rulings of the court in admitting the testimony of Bass, also the charge of the court thereon, as above set forth. The court refused to grant the new trial, and this is complained of, and error assigned thereon, and the same is now here for review.

We are of the opinion that the testimony of Bass, as to the conduct and sayings of Lemuel Dean at the time the

SCOTT vs. Mathis.

survey was made in 1869, was inadmissible, and that the court erred in admitting the same, over the objections of the plaintiff in error, as it had been made to appear that Lemuel Dean, at that time had, by proper deeds of conveyance made long before, parted with all title or interest in this land. What he did or said was mere hearsay, under the facts in evidence. If he had at that time been the owner of the land, what he said or did would have been proper evidence, and would have bound subsequent purchasers from him, but the defendant below, now the plaintiff in error, claimed under a deed of conveyance made by Lemuel Dean in 1863, six years prior to the survey made by Bass, and before the alleged admissions of Lemuel Dean. Clearly, these admissions by Dean, under the circumstances, could not bind Marion, and if they cannot have this effect, then they are mere hearsay and inadmissible; hence the charge of the court founded thereon is like wise error. So the new trial should have been granted, as prayed for by the plaintiff in error.

Judgment reversed.

SCOTT vs. MATHIS.

1. An action *quare clausum fregit* having been brought by a woman, she was competent to testify that her husband purchased the land upon which the trespass was alleged to have been committed from her father, although both of them were dead, neither of them being a party to the cause of action or issue on trial, and the whole controversy being between her and the person alleged to have committed the trespass.
2. If both plaintiff and defendant in an action of trespass claimed title to the land, and the defendant had the legal title thereto, he did not become a trespasser by taking possession. For one to take possession of his own land is not a trespass, unless another has the right of possession thereof.
3. If one takes possession of land, honestly believing that it belong to him, although he may be mistaken, the true owner could not recover actual damages from him.

... who does not own land has had it set apart a

Scott vs. Mathis.

homestead, would give her no right as against the real, nor would she therefore be entitled to recover against him entering and taking possession of the land.

5. A new trial should have been granted, not on the ground which it was granted, but on other grounds.

December 4, 1883.

Witness. Evidence. Trespass. Damages. Acquittal. New Trial. Before B. D. EVANS, Esq., Judge *pro hac vice* Washington Superior Court. March Term, 1883.

Mrs. Martha Scott brought an action of trespass *clausum fregit* against Dr. A. Mathis. On the trial, appeared that both sides claimed title to the land on which the trespass was alleged to have been committed. Scott claimed that her husband had bought it from her father, and paid the purchase money, but had taken no deed, and that she had taken a homestead in it. Defendant claimed it under a purchase from the father of plaintiff, and also under certain sheriff's sales against her father, covering this land, the *fi. fa.* being superior which was superior to his purchase from them. He testified that he did not know of the claim of plaintiff until his purchase at sheriff's sale; that, learning of it then, he was advised by an attorney to re-levy on the part of the land in dispute, and did so; but was subsequently advised by other attorneys that it had been sold once, and could not be sold again, and that he should take possession, which he did (as he testified) in good faith, and retained possession until evicted by plaintiff under a warrant for forcible entry and detainer.

The jury found for plaintiff \$200.00. Defendant moved for a new trial, on the following, among other grounds: (1.) to (5.) Because the verdict was contrary to law and evidence, and against the weight of the evidence.

(6.) Because the court admitted, over objection, testimony of the plaintiff to the effect that her husband W. Scott, bought, in 1859, eighty acres of land from her father, John Elkins, and paid the latter for it, but to

deed, which tract embraced the land in dispute, and that she claimed under her husband, who was dead.—The objection was that Elkins was dead.

(7.) Because the court refused the following charge: "If you find from the evidence that both the defendant and plaintiff claimed the land in dispute, when the alleged trespass was committed, then he is deemed in possession who has the legal title, and the other party is a trespasser." [The court charged that this principle applied only when both parties had deeds covering the disputed land, and each party was in possession of a part of the land covered by his deed, and in such a case, he is deemed in possession who has the paramount legal title.

(8.) Because the court refused to charge as follows: "So, if you find that both Mrs. Scott and Dr. Mathis claimed the possession of the land in dispute, at the time of the alleged trespass, then, if you find from the evidence that Dr. Mathis has the legal title paramount to the title of Mrs. Scott, then Dr. Mathis is no trespasser."

(9.) Because the court refused the following request: "Mrs Scott cannot recover upon her bare previous possession, unless she shows that Dr. Mathis was a wrong-doer and had no *prima facie* right to the possession of the land in dispute; but if you find Mrs. Scott had a lawfully acquired possession, and Dr. Mathis disturbed that possession, she can recover for any deprivation of that possession."

(10.) Because the court charged as follows: "When Mrs. Scott applied for her homestead, and notice of her application was duly published in terms of the law, then it was the duty of all persons interested to appear and object to its grant to her, and if they failed so to do, if they failed to appear before the court of ordinary and object thereto, the homestead so taken out gave her a legal right to possession, and she was not, so far as that possession was concerned, a trespasser, with a paramount legal title, as on Dr. Mathis, and she might maintain trespass, when that possession was disturbed, on her bare possession only."

(11.) Because the court charged as follows: "When I Mathis found that the land in controversy was in dispute and that Mrs. Scott claimed the same, he had no right to dismiss his levy, take the law into his own hands, and interfere with Mrs. Scott's possession, though he had the legal title to the land. Courts are established for the adjudication of disputed rights, and he ought to have submitted his claim to the court, and had it passed upon."

(12.) Because the court refused the following request: "If you find from the evidence that Dr. Mathis, when he took possession of this land, *bona fide* claimed the title thereto, and took possession thereof under an honest claim and belief that he owned the land, then you can find, if you find in favor of Mrs. Scott, only the actual damages done to her by Dr. Mathis's taking possession of the land."

(13.) Because the court charged as follows: "If you believe, when Dr. Mathis took possession of this land, he honestly thought he had title, and if you find that no person was in actual possession, then you can only give the plaintiff her actual damages. But if you find that Mrs. Scott was in possession, then Dr. Mathis is liable not only for the actual damages, such as tearing down the fences, etc., but he is liable for punitive damages, though he took possession under an honest belief that he had the title to the land and the right to enter, and it will be your duty to find for the plaintiff punitive damages for her injured feelings and to deter further trespasses."

The court granted a new trial on the sixth ground of motion. Both sides excepted—the plaintiff to the grant of the new trial; the defendant, because it was not granted on all the grounds.

H. D. D. TWIGGS; E. S. LANGMADE, by brief, for plaintiff in error.

J. K. HIXES, by H. E. W. PALMER, for defendant.

BLANDFORD, Justice.

The plaintiff brought her action against the defendant for trespass *quare clausum fregit*, and a verdict was rendered for her; whereupon the defendant moved the court for a new trial, upon several grounds. The court granted the new trial, upon the sole ground that there had been error committed in allowing the plaintiff to testify that her husband, who was dead, had purchased the property (land), upon which the trespass is alleged to have been committed, from John Elkins, her father, who is also dead. The plaintiff excepted to this grant of a new trial on this ground, and assigns the same as error. The defendant brings his cross-bill of exceptions, assigning as error the refusal of the court to grant the new trial upon the other grounds in the motion.

1. We think the court erred in granting the new trial upon the ground on which he placed it. Mrs. Scott is a competent witness under the act of 1866, Code, §3854, unless she falls within some exception to that statute. She was allowed to testify what took place between her husband and father, they being dead, about the land mentioned. Neither the husband nor the father was a party to cause of action in issue or on trial in this case; the whole cause of action and matter in controversy was between the plaintiff, Mrs. Scott, and the defendant, Mathis, both of whom were alive; she was clearly a competent witness, and it was manifest error to have granted the new trial on this ground; and this judgment is reversed.

2. The defendant insists that the court committed error in refusing the new trial on other grounds mentioned in the motion. And we are satisfied that the refusal to charge as requested in the ninth ground of the motion was error; that if plaintiff and defendant both claimed the land, and if defendant had the legal title, he was not a trespasser. This request should have been given, under the facts of this case; if a person takes possession of his

Bell vs. Love.

trial of the issue, formed on this petition, the plaintiff Love, offered the returns of Thrasher, guardian, to the court of ordinary, without more, to sustain the issue thus made by him; defendant, Bell, objected to this evidence upon the ground that the returns made by Thrasher, guardian, under the circumstances, were mere hearsay. The court overruled the objections and admitted the testimony, and this is the main ground of error complained of.

Code, §4112, declares that no letters of guardianship shall be granted except at a regular term of the court of ordinary. The proceedings of the court of ordinary showing upon their face that letters of guardianship had been granted by the ordinary at chambers, and not at a regular term, it is made manifest that such appointment is void, and was made without jurisdiction or power in the ordinary who made the appointment. So it seems to follow that Thrasher was not guardian, and all his acts as such were nullities. He having made returns to the ordinary, and such returns having been accepted and recorded by the ordinary, could give the same no more effect than if they had never been so returned and accepted by the ordinary. When offered in evidence, they were the sayings alone of Thrasher, and should not have been admitted in evidence. There is no such thing as a *de facto* guardian in this state. Public policy requires in some cases that persons who assume to act in public offices shall be considered such officers *de facto*, if they are not such *de jure*, but this principle does not apply to the offices of executors, administrators and guardians; in the former cases, such persons are removable from office by proceedings in the nature of a *quo warranto*, while in the latter cases, all the acts of persons not properly appointed by a court having jurisdiction are null and void, and they are liable to the persons interested for the same. We do not decide upon the equitable rights of the parties, as no such question is made in this record. A new trial should have been granted in this case.

Judgment reversed.

Clarke et al. vs. Beck.

CLARKE et al. vs. BECK.

1. Where a vendor sold land, and gave a bond for title, and his vendee paid the purchase money, and went into possession, either by himself or by his tenant, and held the same adversely, he thereby acquired a good title, and one who subsequently bought from the same vendor, and took a deed to the property, acquired no title as against him.
2. A tenant cannot dispute or deny his landlord's title, nor can he attorn to any other person during the tenancy. Therefore, the landlord was not affected by the fact that the tenant represented to the second vendee, that he was the tenant of the vendor, and after the sale to the second vendee agreed to attorn to him.

February 2, 1884.

Title. Landlord and Tenant. Admissions. Deeds
Before Judge HAMMOND. Fulton Superior Court. April
Term, 1883.

Reported in the decision.

W. I. HEYWARD, for plaintiffs in error.

THOMAS FINLEY, by brief, for defendant.

BLANDFORD, Justice.

This was an action for the recovery of a lot in the city of Atlanta.

It was admitted on the trial that one Hicks, or Hickson, as he was called, was the original owner of the land in question. Clarke introduced a deed of conveyance from said Hickson to himself, dated May, 1881, and proved that one Robinson was then in possession of the premises, and that at and before the making of the deed, he inquired of Robinson, whose tenant he was, and Robinson informed him that he was the tenant of Hickson. When the deed was made, Robinson agreed to attorn to Clarke.

Beck introduced a bond for titles from Hicks to the land, dated March, 1880; proved that he had paid the purchase money, and that he put Robinson in possession of the land

Clark et al. vs. Beck.

as his tenant, and that Robinson attorned to, and paid rent. After the deed was made by Hickson to Clarke, Robinson ceased to pay rent to Beck, who then turned Robinson out of possession, and Beck took possession himself when this action was brought by Clarke. The court charged the jury that, if Beck purchased this land from Hickson, and paid the purchase money, took a bond for title, and went into possession of this land, either by himself or his tenant, and held the same adversely before sale and conveyance by Hickson to Clarke, then Clarke could not recover.

The jury found for Beck, and Clarke moved for a new trial, alleging the charge above as error. The court refused to grant the same, and this is the error assigned by him.

Under the facts proved, the charge was not error. The bond for titles, and the payment of the purchase money together with the possession of the land by Beck, was a perfect equity in the land as amounted to a title, superior to the title of Clarke.

But counsel for plaintiff in error insists that, as plaintiff's deed was recorded in time, and the bond which Beck held was not recorded, and inasmuch as Clarke made no inquiries of Robinson, who was in the actual possession of the premises, and was informed by Robinson that he was the tenant of Hickson, that Clarke was an innocent purchaser, without notice, and this falsehood of Robinson, Beck's tenant, should be visited on Beck, and not on Clarke. The maxim is *potior est conditio defendentis et possidentis*. A tenant is not allowed to dispute or deny his lord's title, nor can he attorn to any other person during the tenancy, nor is the landlord bound by the false or fraudulent conduct of his tenant to his prejudice. The denial of the title of the landlord by the tenant, or the denial of the tenancy by the tenant, cannot operate to the prejudice of the landlord; the possession of the tenant is still the possession of the landlord. So that in this case Beck was in possession of the land by Robinson, his

Williams vs. Mize, sheriff.

ant, when Clarke purchased, this possession being under a bond for titles, and adverse, and the purchase money paid. The title to the property was in him, Beck, and this was a legal title, and not a mere equity, or latent equity, or secret incumbrance, and possession is notice. The verdict, judgment and charge of the court are right, and the same are affirmed.

Judgment affirmed.

WILLIAMS vs. MIZE, sheriff.

1. A prisoner was arrested for simple larceny, and, in default of bail, was committed to jail to answer for such offence before the superior court; before he was actually incarcerated under the warrant of commitment, he was carried before the county court, charged with the same offence, plead guilty and was fined; an outside party agreed to pay the fine, and the prisoner was discharged by the sheriff; afterwards the person who assumed the payment of the fine imposed in the county court failed to pay it, and the sheriff re-arrested the defendant and placed him in jail; he sued out a writ of *habeas corpus*; the judge of the superior court, on the hearing, refused to discharge the prisoner, and committed him to answer before the superior court for the same charge on which he had been tried, convicted and sentenced in the county court: **Held, that** this was error. When the sheriff discharged the prisoner, taking the promise of another to pay the fine, he could not afterwards hold the defendant or arrest him for not paying it. By making this arrangement, the sheriff became liable for the amount of the fine, and must look to the person on whose promise he acted. The defendant was not liable to an arrest and imprisonment of a failure to pay.

September 25, 1883.

Constitutional Law. Criminal Law. Sheriffs. Courts.
Before Judge FORT. Sumter County. At Chambers,
February 16, 1883.

Reported in the decision.

L. J. BLALOCK, for plaintiff in error.

J. A. ANSLEY, for defendant.

Williams vs. Mize, sheriff.

BLANDFORD, Justice.

The plaintiff in error having been arrested and placed in jail, presented his petition to the judge of the superior court, praying the issuing of a writ of *habeas corpus*, which was awarded by the judge, and at the hearing, nothing appeared but the petition and the return of the sheriff, which adopted the facts in prisoner's petition. The judge refused to set the prisoner at liberty, but remanded him to jail, to answer indictment in the superior court. This ruling is excepted to, and error assigned thereon.

It appears that the prisoner had been arrested for simple larceny, and, in default of bail, he was committed to jail to answer for said offence charged before the superior court; before he was actually incarcerated under the warrant of commitment, he was carried before the county court and charged with this same offence, to which he pleaded guilty, and was fined by said county court one Glover agreed to pay the fine, and prisoner was discharged by the sheriff; afterwards, Glover failing to pay the fine, Williams was arrested by Mize, the sheriff, and placed in jail; and upon these facts the judge of the superior court, upon the hearing of the *habeas corpus*, refused to discharge the prisoner, and committed him to answer the same charge for which he had been tried, convicted and sentenced by the county court, before the superior court.

The county court had jurisdiction to try Williams for the offence with which he was charged. If the same was a felony, it does not appear in the record before us; and in the absence of anything to the contrary, this court will presume in favor of the jurisdiction of the county court.

When the sheriff discharged Williams, taking the promise of Glover to pay the fine, he could not afterwards hold Williams or arrest him for not paying the fine; he must look to Glover for the fine, and by this arrangement between Glover and the sheriff, the sheriff was liable for the

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amount of the fine. The prisoner was not, under these circumstances, thereafter liable to arrest and imprisonment for the non-payment of the fine.

The superior court of Sumter county had no power or jurisdiction to try Williams for this offence with which he had been charged and tried by the county court of Sumter county; and upon the hearing of this case upon the facts in this record, the judge of the superior court committed error in remanding Williams to jail and not discharging him.

The judgment is reversed.

HILL vs. THE STATE OF GEORGIA.

The Code leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; they are not limited or circumscribed in any respect whatever; nor does the law prescribe any rule by which the jury may or ought to exercise this discretion. Therefore, a charge that the jury, in considering the question of recommending to mercy, should not be governed by their sympathies, but by their judgments, approved by the evidence in the case and the law applicable to it, was error.

September 11, 1883.

Criminal Law. Charge of Court. Before Judge BROWN.
Cherokee Superior Court. February Adjourned Term,
1883.

Reported in the decision.

P. P. DUPREE; NEWMAN & ATTAWAY, for plaintiff in error.

C. ANDERSON, attorney general; G. F. GOBER, solicitor general, for the state.

BLANDFORD, Justice.

George Hill was indicted and found guilty of the mur-

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der of Bill Bryant. A motion for a new trial was made upon several grounds, which was overruled by the court below, and the defendant excepted, and assigns as error the refusal of the court to grant said motion. It is unnecessary to consider but one ground contained in the motion for new trial. The court below instructed the jury, "If you find this defendant guilty, then you have a right; under our law, either to find him guilty without a recommendation, or you have the right, if you find him guilty to recommend that he be punished by imprisonment in the penitentiary for life. If you find him guilty, it is for you to consider the case and say whether it is a proper case for that or not. You are not to be governed in that instance by your sympathies, but by your judgment, to say whether or not it is such a case as it ought to be done. You must be governed by your judgment, approved by the evidence * * * in the case and the law applicable to it, and then say what is your duty as twelve upright, sworn jurors; if you see proper to recommend his imprisonment for life, you will then find that verdict * * *; if you think it is not such a case as would make it proper to so recommend, then you are to find him guilty * * *."

The Code of Georgia, §4323, declares: "The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life; in the former case it is not discretionary with the judge; in the latter it is." This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; it is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion; it does not say that the jury are not to be governed by their sympathies, and

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that they are to be governed by their judgment, as instructed by the court below. The court below imposed, by its charge, restrictions upon the jury unauthorized and unwarranted by the statute. In the case of *Johnson vs. State*, 58 *Gu.*, 491, this court held the same thing; that is, where a party was charged with the offence of cattle stealing, which was felonious upon conviction, unless the jury recommended to mercy, in which event the punishment was as for a misdemeanor, that "the right of the jury is to lessen the punishment by the grant of mercy, and the right of the defendant is to receive mercy from the jury, if they see proper to grant it. * * The law not limiting this free grant of mercy in the jury, the court should not limit it in charging the law thereon."

The court below committed error in his instructions to the jury, as above set forth, and should have granted a new trial on this ground.

Judgment reversed.

 ROGERS vs. THE E. M. BIRDSALL COMPANY.

Before an attachment can issue under sections 3297 and 3297(a) of the Code, it is essential that bond and security be required by the judge of the superior court, and that such bond be given by the petitioner before the grant of the writ.

December 4, 1883. (Head-note by the court.)

Attachment. Bonds. Before Judge LAWSON. Morgan County. At Chambers. April 24, 1883.

The E. M. Birdsall Co. petitioned for an attachment under §3297 *et seq.* of the Code. The attachment issued and was levied. The defendant filed an application to dissolve it. On the hearing, defendant moved to dismiss the attachment, because no bond had been given. The motion was overruled, and this was one ground of exception.

J. F. ROGERS, for plaintiff in error.

Rogers vs. The E. M. Birdsall Company.

F. C. FOSTER; McHENRY & McHENRY, for defendant

JACKSON, Chief Justice.

Λ A motion was made to dismiss the attachment, because it was granted on plaintiff's petition before bond and security was required and given. The motion was denied, defendant in attachment excepted. The construction of sections 3297 and 3297(a) settles the point clearly against the judgment of the court below. Section 3297 provides that, whenever a debtor shall sell or convey, for the purpose of avoiding the payment of his debts, or shall threaten or prepare so to do, his creditors may petition the judge of the superior court for an attachment, etc. This is the act of 1873, codified in this section. No direct requirement was made for bond and security in that act, and it is contained in that section. In 52 *Ga.*, 376, however, this court held that "the judge issuing the attachment should require a bond, in his discretion, before he grants this summary process for the seizure of defendant's property." That was the construction put upon the section 3297 alone, by this court, in 1875, before the act of 1877 codified in §3297 (a), was passed.

That act of 1877 was entitled an act to amend the Code generally, without any reference to the new ground of attachment, which merely adds the act of making a fraudulent lien to the other acts contained in §3297 as authorizing an attachment; and it enacts further, and is so codified in §3297 (a), that "in all cases where an attachment is sought against the fraudulent debtor, the officer issuing the same shall require bond and security of the applicant for attachment, as in other cases of attachment.

In all other cases of attachment, the bond and security must be required and given before the writ is issued. Code, §§3294, 3266. So that it must be too clear for argument, that the court erred in issuing this attachment though founded on the grounds in §3297, before he required

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I took the bond with security, which the law declares it be taken. The writ is a harsh process, and the prerequisites must be required strictly. Judgment reversed.

JEFFERS et al. vs. WARE.

Person, Chief Justice, did not preside in this case, on account of providential

summons calling the defendant into court to answer the plaintiff's demand is indispensable to give jurisdiction to a justice court. About it, no case is pending between the parties, and any judgment rendered in its absence is void, and may be so held in any court, when it becomes material to the interest of the parties to consider it; it may be attacked in any court by anybody. Judgment having been rendered against a defendant and the writ on his bond dissolving a garnishment, without any summons on which to base the same, it should have been set aside on the ground of the security.

October 4, 1883.

Justice Courts. Jurisdiction. Judgments. Nullities. Before Judge ROSEY. Richmond Superior Court. October Adjournd Term, 1882.

Reported in the decision.

F. W. CAPERS, Jr., by M. CUMMING, for plaintiffs in error.

W. H. FLEMING, for defendant.

HALL, Justice.

This was an appeal from a justice's court, tried in the superior court of Richmond county, and on that trial, a verdict was found for the plaintiff. The defendants moved for a new trial on two grounds.

(1.) Because the court erred in overruling defendants' motion to continue the case, for the reason that the proceedings did not disclose that there had been any original

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suit in the lower court, and in ruling that, inasmuch as appeared from the statements of counsel, that all the record in that court is here, that the defendants were present in the court, had pleaded the general issue *ore tenus*, and went to trial without objection, they had waived all right to object at this stage of the case to the absence of pleadings—the defendant upon said trial having obtained judgment in his favor, from which plaintiffs appealed.

(2.) Because the verdict was contrary to evidence.

This motion was made before Judge Tompkins on 22d of June, 1882, and on the 26th day of February thereafter was overruled by Judge Roney. No bill of exception was prosecuted thereto.

There had been a garnishment in the suit, which was dissolved by the defendants' giving bond, with Newberry as security. When the verdict was returned in the superior court judgment was entered both against the defendants and the security on the bond dissolving the garnishment. At the April term, 1883, of the superior court, the defendants and security on the bond dissolving the garnishment moved to set aside the judgment rendered against them, upon this, among other grounds: that no suit was ever instituted against the defendants in the justice's court from which an appeal could be taken, no summons having issued and been served upon the defendants, and without this that no garnishment could issue which a bond could be taken to dissolve; in short, that the entire proceeding was a nullity. This motion was overruled, and from the judgment overruling the same a writ of error was prosecuted to this court.

The record here shows that the grounds taken in this motion were supported by the facts in the case. A summons, calling the defendants into court to answer the plaintiff's case, was indispensable to give jurisdiction to the justice's court. Without it there was no case pending between the parties.—Code, §4139.—and any judgment rendered in its absence is void. 54 *Ga.* 496. A judgment

of a court having no jurisdiction of the person and subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court, when it becomes material to the interest of the parties to consider it. Code, §3594. The law goes further, and declares that a void judgment may be attacked in any court and by anybody. *Id.*, §3828

It follows from these provisions of the Code that the motion to set aside the judgment in this case should have been sustained, and that the superior court erred in disallowing and overruling it.

Judgment reversed.

BERRY vs. THE NORTHEASTERN RAILROAD.

1. A widow may recover for the homicide of her husband; she will have a right of action whenever the husband, had he lived, would have had such right, and whatever would have been a good defence to his suit, had he lived, will be equally available against one brought by her.
- (a.) If the husband by ordinary care could have avoided the consequences to himself, even when caused by defendant's negligence, he would not have been entitled to recover.
- (b.) The conduct of the deceased in this case evinced a total want of that care which a man of common sense would take of himself, and is nothing short of gross negligence. He voluntarily got drunk, placed himself in a situation of peril, without the intervention of the rail road company, fell over an embankment into one of their cuts, and was killed. Under these facts, the railroad was not liable, and a non-suit was right.
- (c.) Railroad companies are required to keep in good order, at their expense, the public roads or private ways established by law, where crossed by their several roads, and build suitable bridges and make proper excavations and embankments, according to the spirit of the road laws; but they are not bound to keep in good order and maintain or establish bridges, etc., wherever their roads happen to cross a path or unfrequented way. Such ways are not private ways in the sense or spirit of the road laws. In this case the path pursued by the party killed does not appear to have been a way established by law, or one to the use of which the deceased had any prescriptive title.

September 11, 1883.

Railroads. Damages. Negligence. Roads and Bridges. Before Judge ESTES. Habersham Superior Court. February Term, 1883.

Reported in the decision.

CRANE & JONES, by J. J. KIMSEY, for plaintiff in error

C. H. SUTTON; G. D. THOMAS, by H. McALPIN, for defendant.

HALL, Justice.

This was a suit to recover damages for the homicide of the plaintiff's husband, who was killed, while in a state of intoxication, by falling into a cut eighteen or twenty feet deep, in the night-time, on the defendant's railway. It appears, from the testimony in the case, that the railroad severed a way about eight feet wide, and which had been used by persons residing in the neighborhood, for twenty or thirty years previous to the time in question, generally as a foot-way, or by persons riding on horseback, and occasionally by those riding in carriages on wheels. After the railroad was constructed, it does not seem that any use was made of this way at the point near which this injury occurred. Ways had been made from this road to grade points at each end of the cut.

The deceased lived only a half mile from the place; was well acquainted with the situation; had worked upon the cut, which was completed only a short time before his death; on each side of this cut a dirt embankment from three to five feet high had been left by the railroad company. From the fresh prints of feet and hands, it is probable, if not certain, that the deceased had clambered over one of these banks of dirt, and fallen from it into the cut below. When he left the house of his neighbor, a half mile from the spot, to go to his home, he was not so drunk that he staggered, but his gait was un-

steady; when he came to this house he was intoxicated, and while there he took another drink. He was so much under the influence of drink, that this neighbor induced him to leave with him the money he had, fearing that he might lose it in a creek which he had to cross on his way home. At the close of the testimony, the defendant moved a non-suit, which motion was sustained, and the case dismissed.

Was the court right in awarding this non-suit? Was there any testimony in the case upon which a verdict for the plaintiff could have been found? In our opinion there was not, and from this it follows that the judgment of the court below was correct.

The plaintiff, under the Code, §2971, being the widow of the deceased, would have had a right of action, whenever the husband, had he lived, would have had such right, and whatever would have been a good defence to his suit would have been equally available to one brought by her. *W. & A. R. R. vs. Strong*, 52 Ga., 466, 467. If the husband, by "ordinary care, could have avoided the consequences to himself," even when caused by the defendant's negligence, he would not have been entitled to recover. Code, §2972. The conduct of the deceased evinces a total want of that care which a man of common sense would take of himself, and is nothing short of gross negligence. He voluntarily got drunk, and while in that condition placed himself in a situation of peril. Neither the defendant nor any of its employes had any agency in making him drunk or in conducting him to the precipice; they did not contribute to the disaster which befell him, and were in no sense liable for the damage. *The Southwestern Railroad vs. Hankerson*, 61 Ga., 114, and *Southwestern Railroad vs. Johnson*, 60 Ga., 667, are decisive upon this question.

The company, in constructing this cut, omitted no duty that the law imposed upon them. The road intersected by

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the railway was in no legal sense a private way, and the defendant was not required to provide crossings at the intersection of that road with the railway, or to keep the same in good order. It does not appear to have been established by the court of ordinary, nor does the evidence make it appear that the deceased had any prescriptive title to its use. Code, §§720, 721, 731. Railroad companies are required to "keep in good order, at their expense, the public roads and private ways established pursuant to law, where crossed by their several roads, and build suitable bridges, and make proper excavations and embankments according to the spirit of the road laws." Code, §706.

This negatives the idea that they are bound to keep the roads in good order and to maintain or establish bridges, etc., whenever their roads happen to cross a path or unfrequented way. Such ways are not private ways in the sense of the spirit of the road laws. *Childers vs. Holloway*, 69 Ga., 775; *Short et al. vs. Walton et al.*, 61 Ga., 28. The testimony failed to show the road here was a private way in the sense of the road laws, or if it was, that the plaintiff's husband had any right whatever to its use. There was nothing in the evidence to found a verdict for the plaintiff on, and the non-suit was properly awarded.

Judgment affirmed.*

*See *Bush vs. Brainard*, 1 Cow., 78; *Howland vs. Vincent*, 10 Metc., 871; *Birgh, etc., R. R. vs. Bingham*, 39 Ohio, St. 364; *Omaha, etc., R. R. vs. Martin* (Supreme Court of Nebraska), cited 28 Alb., L. J. 257; (Rep.)

PRYOR vs. WEST, administrator.

1. A suit was brought on a contract; the proof failed to establish a contract sued on, or any other contract on which a recovery could be had; neither was there enough either in the pleadings or evidence to form a basis for a recovery on a *quantum meruit* or *quantum valebat*.
2. As to the claim for supporting and maintaining the child of the defendant, which accrued during his lifetime, it is barred by the statute of limitations.

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of limitations. So far as the claim was for services, support, etc., since his death, his estate was not liable therefor, but it was a charge against that part of the estate which would be coming to the child; his guardian, not the administrator, was the proper party against whom to make such demands.

October, 2, 1883.

Actions. Contracts. New Trial. Before Judge FORT.
Sumter Superior Court. April Term, 1883.

Reported in the decision.

J. W. BRADY ; GUERRY & SONS, for plaintiff in error.

B. P. HOLLS, for defendant.

HALL, Justice.

This was an action to recover from the defendant, as administrator of James P. West, deceased, the value of services rendered by the plaintiff for nursing, rearing, boarding, clothing and educating intestate's infant child, James P. West. This child was taken charge of by the plaintiff's family, when between two and three years old, and remained with them thirteen and a half years. One hundred dollars per annum was charged for these services and supplies for the first three years he was with them; after that, seventy-five dollars per annum was charged for the remaining years he was with them. These services, etc., were rendered in pursuance of an alleged contract with defendant's intestate to take said child and rear, maintain, clothe, nurse and educate him, "until he should arrive at an age of responsibility," for which intestate promised to pay plaintiff. The intestate died in 1874, when this child was about seven years old. He was a man of means; indeed, it is alleged in plaintiff's declaration that his estate was worth \$26,000. The suit was commenced on the 6th day of September, 1881, seven years after the death of the intestate. The defence set up was the general statute of limitations.

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The only witness offered for that purpose failed to establish the contract sued on, or any other contract which a suit could be maintained. The testimony of the witness went no further than this: "that the intestate placed the child to plaintiff's wife and himself to raise; he expected to pay for it; did not say what amount he expected to pay; the understanding, as gathered from conversation with witness, was, that he was to pay plaintiff's wife for raising the child; he said he was willing to give her his house and lot in Americus."

There was no bill of particulars attached to the declaration, and not a single item of the supplies furnished, or the value thereof, was given. Most of these services were rendered and supplies furnished since the death of plaintiff's intestate. The defendant's liability to pay this debt was placed upon the fact that he acquiesced in the child remaining with plaintiff's family and being supported by them, after the death of its father. Nothing is said as to any knowledge he had of the terms or conditions upon which the child was placed or remained there. During the years of his administration, no demand, nor even a request, was made for compensation. When the plaintiff closed his case, a motion was made to non-suit it, and the motion was sustained by the court, and the case dismissed.

This judgment is manifestly correct, for two reasons:

1st. Because there was no evidence upon which a recovery by the plaintiff could have been sustained. There was certainly no proof to establish the contract sued on, and there was just as little foundation for a *quantum meruit* or *quantum solutus* recovery.

2d. If plaintiff ever had any cause of action, it was barred by the statute of limitations. As to the amount of indebtedness that accrued in the life of defendant's intestate, that was certainly barred.

As to what was claimed for services, support, etc., so frequently rendered and furnished, the defendant's estate was not liable; the portion coming to the child was charged

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with it, and his guardian, and not the administrator of the deceased, was the party to look to for payment. If the administrator had settled this demand, that would not have relieved him from liability to account to the guardian for the amount.

Judgment affirmed

DANIEL, administratrix, vs. BURTS, administratrix.

1. In an action brought by a client to recover from his deceased attorney's estate money had and received by such attorney for his benefit, a defendant in the execution which the attorney had held for collection would not have been competent at common law to testify that he paid the money to the deceased attorney.
2. For the client to release such witness from further liability on the *ft. ft.* would not render him competent; the lien of the attorney for fees would still remain.
3. The witness was not rendered competent by the evidence act of 1883 (Code, section 3854); the other party was dead, and the witness was not competent.

October 9, 1883.

Witness. Evidence. Before Judge WILLIS. Muscogee Superior Court. May Term, 1883.

Mrs. Daniel, administratrix of J. M. Daniel, deceased, sued Mrs. Burts, administratrix of D. M. Burts, deceased, to recover money had and received by Burts, deceased, as an attorney at law, for the use of Daniel, deceased. Plaintiff showed that Burts had acted as attorney for Daniel in a suit on a note against a Mrs. Walker and her children, one of whom was named Woolfolk Walker, and that a verdict and judgment had been recovered against these defendants. Plaintiff then offered to prove by Woolfolk Walker that he had paid the amount of the execution to Burts. On objection, this was rejected. Plaintiff then offered to release Walker from any further liability for principal and interest. The court held that the witness

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would still be incompetent, and, on motion, granted a non-suit. Plaintiff excepted.

B. F. HARRELL, by J. M. McNEILL, for plaintiff in error.

PEABODY & BRANNON, for defendant.

BLANDFORD, Justice.

On the trial of this case, one Woolfolk Walker was offered as a witness by plaintiff in error to prove that he, the witness, had paid a certain amount of money, due on a judgment and execution in favor of plaintiff's intestate against himself, to D. H. Burts, defendant's intestate, in his lifetime, he being the attorney at law for said intestate of the plaintiff. He was objected to, upon the ground that Burts was dead. The court sustained the objection, and thereupon plaintiff offered to discharge and release Walker from all liability to her on the judgment. The court held that this would not make the witness competent. To this ruling the plaintiff excepted, and error is assigned thereon. It is clear that Walker, the witness offered, was incompetent to testify in this case at the common law, because he, being liable on the judgment, was interested in placing the liability on Burts, the attorney, thus relieving himself, and the release offered him did not discharge his liability on the judgment to Burts, the attorney, represented by his administratrix, who held a lien on the judgment for the fees of her intestate. So if he was a competent witness at all, it must be under the new evidence act of 1863, pp. 138, 139, Code, §3854, which provides, "No person offered as a witness shall be excluded by reason of incapacity for crime or interest, or from being a party, from giving evidence, * * * * but every person so offered shall be competent and compellable to give evidence, * * * * except as follows:

"Where one of the original parties to the contract or cause of action in issue or on trial is dead, or is shown to

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be insane, or where an executor or administrator is a party in any suit on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor."

It is shown that Burts, the attorney, to whom it is suggested that Walker paid this money, is dead. The cause of action is the receiving the money by Burts from Walker, whereby he became liable to the plaintiff for so much money had and received for her use, Walker still being interested. While he might have been admitted as a witness under this act, yet he falls within the exception to the act whereby he is still rendered incompetent, as the other party to the cause of action is dead. So as to his competency he remains, notwithstanding this act, where he stood before its passage, and as we have seen, he is incompetent as a witness at the common law, and as the law stood before the act; and not being restored by the act by reason of the exception thereto already stated, it follows that the judgment of the court below refusing to allow the witness to testify, under the facts of this case, was right, and the judgment is affirmed.

J. C. & J. D. LANIER vs. ADAMS, THORNE & COMPANY.

Where a bill to enjoin the levy of a mortgage *fit. fa.* on certain goods alleged that the goods covered by the mortgage had been destroyed by fire, and that the stock against which the *fit. fa.* was proceeding was not covered by the mortgage, and the affidavits submitted showed that the present stock was not entirely covered by the mortgage, if any part thereof was so covered, the chancellor should have granted an injunction until the final hearing.

November 20, 1883.

Injunction. Before Judge FAIN. Bartow County. At Chambers. July 23, 1883.

Reported in the decision.

J. C. & J. D. Lanier vs. Adams, Thorne & Company.

AKIN & AKIN, for plaintiffs in error.

A. M. FOUTE ; O. D. McCUTCHEN, for defendants.

BLANDFORD, Justice.

The bill in this case sought to restrain and enjoin defendants from levying a certain mortgage *fi. fa.* upon certain goods in the plaintiffs' possession, because it was alleged that the stock of goods covered by defendants' mortgage had been destroyed by fire, and that the goods which defendants were seeking to have levied on were not embraced in the mortgage. The chancellor refused the injunction, and complainants excepted, and now seek a reversal of that decree.

From the affidavits submitted by the parties to this case at the hearing for injunction, the allegations in plaintiffs' bill are well sustained, and it is not here contended that there were more than five hundred dollars' worth of the goods covered by the mortgage saved from the burning by the defendants in error. And, on the other hand, it is contended by plaintiffs that these goods which were saved were not mortgaged to defendants, but were goods stored in a certain warehouse, and not the store-house of plaintiffs, and that none of the goods in the warehouse were mortgaged, but only the goods in the store-house, and the evidence submitted by plaintiffs seems to look this way; at all events, the same is so strong as to have required the chancellor to have granted the injunction prayed for in this case. It is not insisted upon the part of defendants in error before us but that equity has jurisdiction in this case. No harm can be done by the grant of an injunction in this case, and at the final hearing of the cause, a jury can pass upon all issues of facts, after hearing the evidence adduced by the parties.

Judgment reversed.

FLOYD, executrix, vs. COX.

FLOYD, executrix, vs. COX.

1. A motion was made for a new trial, and a brief of the oral testimony was approved by the presiding judge on September 29, 1882. A written agreement was made, September 30, to the effect that a copy of the written evidence, on being submitted to and agreed upon by the plaintiff's counsel during the next eight days, should be attached to the brief. The certificate of the clerk states that the foregoing account (the subject-matter of this motion to dismiss) was attached and filed October 6, 1882. The bill of exceptions, which was signed October 17th, stated that the defendant offered in evidence the books on which the plaintiff had charged the defendant, copies of which are annexed to a brief of the oral and copies of the written evidence, as agreed on and approved by the court, and forms a part of this record:

Held, that the accounts attached to the brief were sufficiently identified, and the motion to dismiss the writ of error is overruled.

2. Where a running account continued through several consecutive years, being added up at the end of each year, the credits subtracted, and the balance carried forward to the next year, and, after the account had thus continued for several years, the aggregate balance was more than one hundred dollars, the creditor could not divide it into two parts, and thus bring each within the jurisdiction of a justice's court. Although the creditor might have sued at the end of each year, if the balance at the end of the year was charged up on the next year's account, and this was continued through several years without a settlement, the whole became but one account and but one indebtedness.

October 23, 1882.

Practice in Supreme Court. Debtor and Creditor Justice Court's. Jurisdiction. Before Judge STEWART Newton Superior Court. September Term, 1882.

Reported in the decision.

SMITH & SIMMS, for plaintiff in error.

CLARK & PACE, by HARRISON & PEEPLES, for defendant.

BLANDFORD, Justice.

1. The defendant moved to dismiss the writ of error this case upon the ground that a copy of a certain account

 Floyd, executrix, vs. Cox.

which was contained in a certain book of accounts offered in evidence by plaintiff in error, which was attached to the brief of evidence filed on the motion for new trial, and not approved by the court as part of the written evidence in said case. It appears that a brief of the oral evidence was approved by the presiding judge September 29, 1882. An agreement in writing between the parties in this case, by their counsel, to the effect that a copy of the written evidence, on being submitted to, and agreed to by plaintiff's counsel during the next eight days, should be attached to the brief, was signed September 30, 1882. The certificate of the clerk of the court was that the foregoing account was attached hereto, and filed October 6, 1882. The bill of exceptions, which was signed and certified by the presiding judge on the 17th day of October, 1882, states that the defendant offered in evidence the book on which the plaintiff had charged the defendant, a copy of which is annexed to a brief of the oral and copies of written evidence, as agreed on and approved by the court, and forms a part of the record in this case.

The bill of exceptions is a part of the record, and the bill of exceptions states that the written evidence attached to the brief of the oral evidence, the same being a copy of the book of accounts of the plaintiff, Cox, which was offered and read in evidence by defendant, Floyd, "forms a part of the record in this case." Thus it is that the presiding judge affirms and certifies that this copy of the written evidence, attached to the brief of the oral evidence, constitutes a part of the record in the case. It thereby imparts verity, and is identified and verified by the presiding judge. It thereby becomes a part of the brief of the evidence, a part of the record in this case; so that the motion to dismiss is not well taken, and the same is overruled.

2. The question in this case is, where one person is indebted to another upon an account which runs through several consecutive years, and which, in the aggregate amounts to over one hundred dollars, can be sued by

other party in a justice's court, by allowing the account to be divided, so as to make two suits, each under one hundred dollars, but the two sums sued for aggregating the full amount of the account. The account in this case in the whole amounted to the sum of one hundred and thirty-two dollars. The same commenced in the year 1874, and ran regularly on from year to year to November, 1881, each year being added up and credits subtracted, and the balance due being carried over to the next succeeding year, and thus a final balance was left of the sum stated. Two actions were brought in a justice's court against plaintiff in error by defendant in error, at the same time, one for the sum of ninety-five dollars and twenty-five cents, and one for the sum of forty dollars and seventy-five cents, and copies of accounts attached to the summons in these cases show that these two actions embraced the whole account due by plaintiff in error to the defendant in error. The defendant to these actions pleaded to the jurisdiction of the justice's court, in that these two actions were each founded on parts of the same account, which account was more than one hundred dollars; the justice dismissed the plea, and gave judgment for plaintiff, Cox; Floyd appealed to the superior court, and upon the trial of the case, the jury rendered a verdict against the defendant. The defendant moved for a new trial, which was overruled by the court, and he excepted, and complains that this refusal was error.

One ground of error complained of was, that the court charged the jury, that if the account was to become due at the end of each year, then the justice's court had jurisdiction, provided the account for that year did not exceed one hundred dollars.

In this charge the court mistook the law. This was a running account from year to year; there had been no settlement between these parties, and, although the plaintiff might have brought his action against the defendant upon the account at the end of each year, yet, if the balance at the end of each year was charged up on the next

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year's account, this was then, at the end of several years, but one account and but one indebtedness, so that the plain could not divide up this indebtedness so as to give a justice's court jurisdiction. By the act of 1842 (*Cobb's Digest* 653; Code, §4133), justice courts had jurisdiction conferred on them, where a debt had been divided up and several promissory notes were given for the same, within the jurisdiction of that court. It had been held by some of the judges of the superior courts, before the passage of the act, that, where one owed another a debt which exceeded the jurisdiction of a justice's court, a defendant, by dividing the debt and giving several promissory notes, each within the jurisdiction of a justice's court, would not thereby confer jurisdiction on such court. See Welborn, Judge, (*Decisions*). Viewing the whole account of the plain as one entire debt, it follows that the charge of the court complained of was error.* Judgment reversed upon ground that the court erred in refusing the new trial.

Judgment reversed.

McCook et al. vs. Pond, administrator.

A bill was filed against an administrator, making, in brief, the following case: Complainants are the heirs of defendant's intestate; the estate is ripe for distribution; there are no debts; the real estate can be readily divided in kind; and there is no need for a sale of it; an order of the court of ordinary has been granted, authorizing a sale of the realty; a motion was made to revoke this order and on the refusal to revoke it, an appeal was taken to the superior court. The object of the bill was for an account and settlement, and a distribution of the estate; there was a prayer for injunction, to restrain the administrator from selling the realty. On the hearing, complainants introduced affidavits to show that the appeal from the court of ordinary was withdrawn, on agreement of the administrator, that he would only sell one lot. The bill was denied by defendant:

Held, that the injunction should have been granted. The object of this bill was not to interfere with the due course of administration but to wind up and distribute this estate, which is now re-

*Compare *Flournoy & Epling vs. Wooten, ex'r*, 71 Ga., 163.

McCook *et al.* vs. Pond, administrator.

for that purpose; and this may be done as well by a division in kind, as by a sale and distribution of the money.

(a.) The estate in this case is ready for distribution and final settlement, and in this it differs from the cases in 68 Ga., 735; 47 Ga., 195.

(b.) As real estate descends to the heirs in this state, it would seem to be the policy of the courts to favor the heirs by a division of the lands in kind, and they will not be sold, unless it be necessary to pay debts or to have a distribution.

October 16, 1883.

Administrators and Executors. Courts. Equity. Injunction. Before Judge WILLIS. Muscogee County. At Chambers. June 5, 1883.

Reported in the decision.

THORNTON & HARGETT; J. M. LEONARD, for plaintiffs in error.

MCNEILL & LEVY, for defendant.

BLANDFORD, Justice.

The plaintiffs in error, as the heirs-at-law of M. M. McCook, filed their bill against defendant in error, as the administrator *de bonis non* of M. M. McCook, for an account and settlement and distribution of said estate; also, prayed an injunction against the defendant from selling the real estate of said deceased; and it appeared that an order of the court of ordinary had been granted, authorizing the sale of the real estate of said deceased; and that there were no debts to be paid; and that a motion had been made to revoke said order, by plaintiffs, before the court of ordinary, and an appeal taken to the superior court, upon the judgment of the ordinary refusing to revoke said order of sale. This appears by the bill and answer. Upon the motion for injunction before the chancellor, many affidavits were read. The affidavit of the complainant in the bill, of Mattie Moore, and of James M. Leonard, showed that,

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pending the case on appeal to revoke the order of sale. The defendant agreed that if complainant would withdraw the same, the defendant would only sell one lot in the city of Columbus belonging to said estate; that the appeal was then withdrawn. Pond, defendant, in his answer denies this, and the only affidavit submitted by him is that of M. McNeill, which is merely negative, and does not deny this agreement, but says that he, as attorney for Pond, never heard of it when the appeal was dismissed or withdrawn. The affidavits submitted fully show that there is no necessity for a sale of this property for distribution, but the same can be easily partitioned in kind. The court refused the injunction.

The bill filed in this case is not alone for injunction, but for account, relief and distribution. In this respect it differs from cases where this court has held that equity will not interfere with the due course of administration. The bill, answer and proofs in this case show that the estate in the hands of the defendant is ready for distribution and final settlement; and in this respect it differs from the cases of *Bailey vs. Ross*, 68 Ga., 735; 47 Ga., 195.

Under the facts of this case, the court of ordinary should have refused to grant this order of sale. Code, §§2246, 2483, provide that, upon the death of any person, the real estate descends to the heir, except it be necessary to pay debts or for distribution, neither of which in this case is it shown is necessary. There are no debts to be paid, and it can be divided in kind, as is fully shown. But it is insisted that the question as to the necessity for the sale of this property is shown by the order of the ordinary authorizing the sale, and that this order is conclusive upon the plaintiffs. An appeal was taken to the superior court; and the plaintiff, Mrs. McCook, shows by her affidavit and that of Moon and Leonard, against the answer of defendant alone, that if the appeal was withdrawn that defendant would only sell one lot in the city.

of Columbus under this order, and that the same was withdrawn under this understanding or agreement. We cannot doubt, if the case had been prosecuted on the appeal, but that the superior court would have revoked this order, under the facts of this case. The affidavits presented by the plaintiffs overcome defendant's answer on this point, and even had the case been equally balanced by the evidence, the safer course would have been for the chancellor to have granted the injunction, especially where a question of law was involved, and we are clear that, under the facts of this case, the injunction should have been granted. It is not proposed by this bill to interfere with the due course of administration, but to wind it up and distribute this estate, which is now ready for that purpose; and this may be done as well by a division of the land as by sale and distribution of the money. See Code, §2584 to §2588.

Courts of equity have concurrent jurisdiction with courts of ordinary as to the administration of estates, and when, as in this case, an estate is ready for distribution, and the ordinary fails to take the proper steps to bring this about, a court of equity, upon a bill filed for account and distribution, will entertain jurisdiction for that purpose; and then the jurisdiction of the ordinary ceases, pending the bill, and equity may do whatever the ordinary could have done, if the bill had not been filed; and as the ordinary could have distributed the property of this estate in kind, a court of equity may do so likewise, and to that end it may grant an injunction to restrain an administrator from selling the property of the estate, under an order granted by the ordinary, if it be necessary to have a division of the property of the estate in kind, as it has full and complete jurisdiction of the whole matter. It would seem that, as the real estate descends to the heirs in this state, it would be the policy of the courts to favor the heirs by a division of the lands of their ancestor in kind, rather than to have a sale of them. They should not be sold except

Prentice vs. Elliott.

to pay debts and have distribution. If no debts to be paid, and distribution in kind can be made, this policy should be carried out by the courts. *Tucker vs. Parks et al.*, 70 Ga., 414. So, as to this case, this bill is filed, not to interfere with the administration by the ordinary; but as the ordinary has failed to bring about a settlement and distribution of this estate, the object of the bill is to bring about this result; and having acquired jurisdiction, the court will complete it. The injunction should have been granted, and the decree refusing the same is reversed.

Judgment reversed.

PRENTICE vs. ELLIOTT.

1. After the dissolution of a partnership, the statute of limitations does not begin to run in favor of one partner against another until the partnership affairs, as to debtors and creditors of the firm, have been wound up and settled, or, at least, a sufficient time has elapsed since the dissolution to raise the presumption that such was the fact. Each partner is the agent and trustee of the firm and of the other partner, as to the collection of its assets and the payment of its debts. Nor, while there are outstanding assets and liabilities, will a partner be barred as against his copartner, on the principle of stale demands.
2. A partnership may be liable for interest to one partner who makes advances for or to the firm, when there is a special contract to that effect, or where it may be implied from the circumstances that the firm was to pay interest for such advances; otherwise, the partner will not be entitled to interest for such advances or payments, but the liability of the firm will be by account.
 - (a.) A claim by a partner for advances made for the firm is not an account stated, nor an account which by custom bears interest from the end of the year. The amount due cannot be ascertained until an accounting is had between the partners.
 - (b.) The judgment is reversed, unless interest to the time of the trial be written off from the verdict.

November 13, 1883.

Partners. Statute of Limitations. Interest and Usury. Before Judge BROWN. Floyd Superior Court. March Term, 1882.

Prentice vs. Elliott.

Reported in the decision.

UNDERWOOD & ROWELL, for plaintiff in error.

FORSYTH & HOSKINSON; D. S. PRINTUP, for defendant.

BLANDFORD, Justice

Elliott and Prentice entered into partnership in September, 1871, for the purpose of buying and selling cotton, under the name of J. M. Elliott, which continued until September, 1872, when the same was dissolved by Prentice withdrawing from the firm. During the existence of the partnership, Prentice made advances to the firm, and also Elliott; they had dealings with a firm in New York; and in 1876, within four years from the dissolution, the New York firm, Inman, Swann & Co., assigned their claim, which was an account, to John Inman, one of the firm of Inman, Swann & Co., who commenced action in the superior court of Floyd county, and this case was subsequently transferred to the circuit court of the United States for the northern district of Georgia, against Elliott alone, Prentice being a dormant partner and unknown. The case was defended, Elliott claiming that Inman, Swann & Co. were indebted to him because of certain cotton which had been shipped to them; and that if the same had been sold, there would have been no indebtedness on his part, but that Inman, Swann & Co. would have been greatly indebted to him. These transactions took place during the existence of the partnership between Elliott and Prentice. The case between Inman and Elliott terminated in 1876, by a judgment in favor of Elliott. In January, 1878, Elliott filed this bill against Prentice for an account and settlement of the partnership affairs of the firm of J. M. Elliott. To this bill defendant interposed the plea of the statute of limitations. The court held that, under the facts, the plaintiff was not barred; a verdict was rendered by the jury in favor of the plaintiff for a certain sum as principal, and interest on the same from the filing

of the bill. The verdict of the jury was for several hundred dollars less than the amount of the account claimed by Elliott. A motion for new trial was made by Prentice upon the ground that the court erred in his rulings as to the statute of limitations, and because of the finding of the jury as to interest. The court below overruled the motion for new trial. Prentice excepted, and prosecutes this writ of error to reverse the judgment of the court below in overruling the motion for new trial.

After the dissolution of a partnership, the statute of limitations would not begin to run in favor of one partner and against another until the partnership affairs, as between debtors and creditors of the partnership, had been wound up and settled, or, at least, a sufficient time had elapsed since the dissolution to raise the presumption that such was the fact. Each partner is the agent of the firm and of every other partner, as to the collection of its assets and the payment of its debts; they are trustees for the firm and of each other for such purposes. In this case Inman, Swann & Co. claimed a large amount was due from them from J. M. Elliott, arising out of transactions which occurred during the partnership of Prentice and Elliott. J. M. Elliott claimed a large amount due from Inman, Swann & Co. on account of the same transactions. The matter stood thus when the firm of J. M. Elliott was dissolved; suits were instituted by Inman and cross actions by Elliott in relation to the same, and these actions continued until the year 1876; within two years from the termination of this litigation this bill was filed. The same was not barred, and there was no error in the court below thus ruling. In the case of *Hammond vs. Hammond*, 20 Ga., 556, it was ruled that the statute of limitations does not commence to run in favor of one partner against another, even after the dissolution of a partnership, as long as there are debts due from the partnership to be paid, or due to it to be collected. Nor, as long as these things are so, is a partner barred as against his co-partner by the principle of stale demands. This decision is in point, and rules this case.

Was the verdict wrong as to finding interest in favor of complainant from the time of the filing of the bill? The partnership may be liable for interest to one partner who makes advances for or to the firm, where there is a special contract to that effect, or where it may be implied from the facts and circumstances that the firm was to pay interest for such advances, otherwise the partner will not be entitled to interest for such advances or payments, but the liability of the firm will be by account. In this case there was no express or implied contract to pay interest on the money which might be paid to the firm by either partner or paid on account of the firm; such payment, therefore, by the partner who made the same, constituted a claim against the partnership by account. Until the act of 1858, no account in this state, except stated accounts, bore interest, and the claim of the complainant in this bill was not a stated account. By the acts of 1858 and 1873, Code, §2057, it is provided, "that all accounts of merchants, tradesmen and mechanics (and all others), which by custom become due at the end of the year, bear interest from that time upon the amount actually due, whenever ascertained." That the claim of plaintiff was not due at the end of the year is quite manifest; that it was not due until the partnership affairs had been wound up is equally certain and that no interest could be allowed on the same, until it was ascertained; it was not a stated account, and it was not an account which fell due at the end of the year, hence no interest was due thereon until the amount had been ascertained. The parties had not ascertained amount due plaintiff, and this bill was filed for that purpose, and the amount due plaintiff was never ascertained until the finding of the jury in this case. Their finding was less than the amount claimed by plaintiff; it then came ascertained and fixed, and from that time it became an incident of the debt, not before. So the finding by the jury of interest before that time was and a new trial should have been granted by the court.

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low on this ground, unless the plaintiff would write from the verdict the interest up to the time of the trial in the case. The cases of *Southwestern Railroad Company vs. The State* and *State vs. Southwestern Railroad Company*, on the subject of interest, are on this line, and see to affirm the present ruling. 70 Ga., 11.

The judgment of the court below is reversed with instructions to the court below to grant a new trial in the case, unless the plaintiff shall write off the interest four by the jury before trial.

Judgment reversed on terms.

 INGRAHAM vs. BARBER.

Although an agent, employed to sell property, and with whom the notes for purchase money were left for collection, may have violated his duty in failing to secure or collect the same, and in rescinding the trade without authority, yet if he subsequently sold the same property to another, and received land in part payment therefor, and a note for the balance, and if the principal received the land and note, and brought suit on the latter for the balance of the purchase money, she thereby ratified the action of her agent, and could not thereafter bring suit against him on account of his conduct in connection with the original transaction.

November 13, 1883.

Principal and Agent. Ratification. Negligence. Before Judge BRANHAM. Polk Superior Court. February Adjourned Term, 1883.

Reported in the decision.

J. A. BLANCE ; E. N. BROYLES, by brief, for plaintiff in error.

IVY F. THOMPSON ; DABNEY & FOCHE, for defendant.

BLANDFORD, Justice.

The question in this case is, whether the defendant is

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liable to the plaintiff on account of having failed to do his duty as her agent, under the facts in this case.

The testimony shows that she employed defendant to sell a certain saw-mill for her; that he did so, taking certain promissory notes for the purchase money. The person to whom he sold the mill was solvent at the time. The notes were left with defendant to collect; he failed to collect the same; he failed to secure the same, which the purchaser of the mill was willing to do. After the purchaser became insolvent, defendant, without authority from plaintiff, rescinded the sale, took the mill back, together with a certain engine and a certain promissory note on another party, and returned the notes for the purchase money to the purchaser. Defendant subsequently sold the mill to other persons, who failed to comply with the purchase, and he took the mill back again. He finally sold the same to one Morgan, and turned over the contract of Morgan for the purchase price, together with 80 acres of land, and a note on Devens for seventy-five dollars, which plaintiff received, and commenced suit against Morgan on this contract. Afterwards brought suit against defendant for violation of the original contract, and carelessness in defendant, and his failure to secure the original purchase money for the mill.

The plaintiff, by having received part of the purchase money from Morgan, and instituting suit against him on his contract, must be considered as having ratified the acts of the defendant as her agent, and cannot now be heard to complain of the same. Whatever her rights might have been originally, she cannot ratify what he did, by accepting the same, and then complain of the conduct of the agent.

Judgment affirmed.

Thomason, assignee, vs. Wade et al.

THOMASON, assignee, vs. WADE et al.

It is the payment of the money by a surety or indorser which gives ~~him~~ **him** in the right to control the execution and reimburse himself from ~~his~~ **his** principal. The entry upon the *fi. fa.* gives him the right to ~~control~~ **control** the *fi. fa.* over any objections of the original plaintiff; but ~~where~~ **where** the latter permits him to have the execution levied on the ~~prop~~ **prop**erty of the maker or principal defendant for his own benefit, a claimant of property so levied on can make no objection.

(a.) It having been discovered that there was no entry on the *fi. fa.* showing its payment by the indorser, pending a claim case ~~arising~~ **arising** under a levy made for the benefit of such indorser, the attorney for the plaintiff in *fi. fa.* could then make the entry. Nor was ~~this~~ **this** an amendment of the writ or levy which would work a dismissal of the latter.

February 2, 1884.

Principal and Surety. Indorsers. Executions. Claims Debtor and Creditor. Before Judge HAMMOND. Full term Superior Court. April Term, 1883.

Reported in the decision.

COLLIER & COLLIER, for plaintiff in error.

N. J. HAMMOND, by B. F. ABBOTT, for defendant.

BLANDFORD, Justice.

In 1860, Lewis Wright obtained a judgment in Full term superior court against Benjamin P. Davis and Daniel Crews, as makers, and John Thomason, as indorser; a writ of execution issued upon this judgment, and the same levied, for the use of Thomason, the indorser, upon certain lands as the property of the makers, the defendant ~~s~~, **s**, to which property, so levied on, Davis Wade interposed ~~his~~ **his** claim. On the trial of the claim case, claimant moved to dismiss said levy, upon the ground that it did not appear that Thomason, the indorser, had paid the same, and ~~there~~ **there** was no entry on the execution to that effect. Plaintiff

proved that Thomason, the indorser, had paid the principal, interest and costs due on said execution to Ezzard & Collier, the plaintiff's attorneys, in 1863, and thereupon Mr. Collier, one of the firm of Ezzard & Collier, then and there entered a receipt on said execution for the principal, interest and costs as received from Thomason in 1863. The court then sustained said motion, and dismissed said levy, and of this ruling Thomason complains, and this is the error assigned.

The Code, §2171, provides that indorsers who pay off a judgment shall have control of the same as securities are allowed by §2167 of the Code, and by this latter section a security who pays off a judgment, by entering such payment on the execution by the plaintiff's attorney, or other collecting officer, may control the same to the same extent and shall be subrogated to all the rights of the plaintiff in execution.

It is the payment of the money by the surety or indorser that gives the right to control the execution. The entry upon the *fi. fa.*, as provided for, gives the right to the surety or indorser to control the *fi. fa.*, over any objections of the original plaintiff; but where the original plaintiff permits a surety or indorser to have the execution levied on the property of the makers or principal defendants for the benefit of an indorser, defendant, the claimant to such property levied on, can make no objection on this account; it is no business of his who controls the *fi. fa.*, and the payment by the security or indorser does not extinguish the judgment as to the principal defendants, and the question as to who shall control the *fi. fa.* is between the plaintiff and the indorser or security; it is a matter with which the claimant has nothing to do. But in this case, when the entry was made on the execution by the attorney for the plaintiff in execution, the statute was literally complied with; it was no amendment of the writ or levy, and the court erred in dismissing the levy.

Judgment reversed.

Elam, executrix, vs. Elam et al.

ELAM, executrix, vs. ELAM et al.

1. Creditors of an estate by account have no right to enjoin the executrix from selling the real estate in the due course of administration, because she is insolvent, and twelve months have not elapsed since the grant of letters of administration, and because they fear that if she receives the proceeds they will lose their claims, waste or mismanagement, or attempt thereat, being alleged.
- (a.) The insolvency of the executrix furnishes no ground for equitable relief. Her condition as to solvency or insolvency is the same now as when she was appointed and qualified.
2. A bare fear on the part of complainants that, if the defendant should sell and receive the proceeds, they would be unable to realize anything upon their claims against the estate which she represents, is not sufficient. It should be clearly shown upon what ground such fear rests.
3. The fact that complainants cannot bring suit until twelve months have elapsed from the grant of letters testamentary, is no fault of the defendant, but is a condition imposed by the law on all persons.
4. The fact that the defendant denies the justice and truth of complainants' demands against the estate, instead of being favorable to the equity of the bill, constitutes an objection thereto which is incumbent on the complainants to overcome by proof.

October 2, 1883.

Equity. Administrators and Executors. Waste. Debtor and Creditor. Before Judge FORT. Sumter County. Chambers. August 4, 1883.

Reported in the decision.

HAWKINS & HAWKINS, for plaintiff in error.

B. B. HINTON; J. A. ANSLEY, for defendants.

BLANDFORD, Justice.

The defendants in error preferred their bill in equity against the plaintiff in error, in which they alleged that she was the executrix of the will of Hodijah Elam, deceased; that they were creditors by accounts due them from the deceased testator; and that the estate of Hodijah was

Elam, executrix, vs. Elam & al.

insolvent, and that the executrix was likewise insolvent; that she had, since the death of the testator, shipped off a box of goods of the deceased; that she had proved the will of testator, and immediately thereupon she was proceeding to sell the real estate belonging to the estate, and that they feared, if she reduced the property of the estate to money, they would be unable to get anything upon their claims.*

The defendant answered the bill, and showed that the box which she had shipped off belonged to her daughter before the death of her husband, and that there were tax executions against the property to the amount \$140.00, a common law judgment and a mortgage which were liens on the property; that it was necessary to sell the property to discharge these liens and pay the debts of the estate. She denied that the estate or her testator was in any manner indebted to the complainants in the bill; and upon the hearing before the chancellor upon the bill and answer alone, he granted an injunction restraining the defendant, as executrix, from selling the property belonging to the estate of Hodijah Elam, her husband. This order granting the injunction is excepted to, and the same is assigned for error.

1. There is no equity in the bill, because there is no allegation as to any waste or mismanagement upon the part of the executrix. She has done nothing, nor is it alleged that she is attempting to do anything, by which the complainants' interests are liable to injury. She may be insolvent, yet this does not constitute any equitable ground for relief, as her condition as to solvency or insolvency is the same now as it was when she was appointed and qualified as executrix.

2. A fear on the part of complainants, that if defendant should sell the property and pocket the proceeds, they would be unable to realize anything upon their claims against the estate which she represents, is a naked allega

*Twelve months from the grant of letters testamentary had not elapsed when this bill was filed.—(Exr.)

Lewis vs. The State of Georgia

tion; it must be shown clearly upon what grounds such fear rests.

3. The fact that they cannot bring suit until twelve months shall have elapsed from the grant of letters testamentary to defendant, is no fault of the defendant, but is a condition imposed by the law on all persons.

4. And the further fact that the defendant denies the justice and truth of complainants' demands against the estate of the testator, instead of being in favor of the equity of the bill, constitutes an objection thereto which it is incumbent on the complainants to overcome by proofs. So, in no view which can be taken of this case, was the chancellor authorized to grant this injunction, and the judgment is reversed.

LEWIS vs. THE STATE OF GEORGIA

1. Death ensuing in consequence of the wilful omission of a duty is murder; death ensuing in consequence of the negligent omission of a duty is manslaughter. Therefore, where the death of a child resulted from cruelty and want of proper food and clothing, the person whose duty it was to maintain and care for it, and whose conduct resulted in its death, was guilty of murder, if the acts were wilfully done; and of manslaughter, if they were negligently done, without malice.
 - (a.) If the death results from the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, although the killing itself be not intended, the offense is murder.
 - (b.) The charge was full and fair, and the question of *animus* was sufficiently submitted to the jury.
2. The sayings of the defendant, made by her during the continuance of the cruel treatment, were not admissible on her own behalf, when offered by her to account for scars and other marks of violence and severe usage appearing upon the person of the deceased.
3. The verdict was not only sustained, but required by the evidence, and a recommendation to life imprisonment was all that the defendant could ask.

December 21, 1884.

Lewis vs. The State of Georgia.

Criminal Law. Murder. Manslaughter. Charge of Court. Before Judge LAWSON. Baldwin Superior Court. January Term, 1883.

Louisa Lewis was indicted for murder, and was convicted, and sentenced to the penitentiary for life. The facts were, briefly, as follows:

A child of eight or ten years of age died under such circumstances as to cause an inquest to be held. A physician examined his body, and found evidences of great ill-treatment and severe usage. There were scars on the head and on different portions of the body, apparently the results of blows; some were older and some of recent date; some of the latter were two inches in length by half an inch broad; there was a contusion on the side, as if from a severe blow; there were fresh marks on the legs, as of a switch or other instrument; the right wrist had been burned, and the wound partially healed, but re-opened, apparently by a recent blow, and left raw, and the body was fearfully emaciated. In the opinion of the physician, the child came to his death from want of proper food, exposure to inclement weather, and the treatment which it had received.

From other testimony for the state, the following history of this child's life is taken:

The child was an orphan, named Willie McDowell. Its mother died in Memphis, and left her child to defendant; it was then about five years of age. One witness testified that even then complaint was made to him, as town marshal, by the neighbors, about the cruel beating of the boy. The witness saw him, and he had been cut over the head, and his lip was swollen, as if from a blow. Defendant sent him to Augusta, and he remained there for some time, being brought back several months before his death. After his return, the treatment of him was very severe. Defendant tied him with ropes, blindfolded him, and stripped him naked in the bitter cold weather of winter, used sticks and a knotted plow-line to whip him, and sent him to the

cotton-field so insufficiently clothed that one of the neighbors protested against it. After one of these beatings, blood was seen running down the legs of the boy, and his clothes were clotted with it. She broke a broom-handle over his head. And because she said he had befouled the floor, she forced him to eat his own excrement. On one or two occasions he asked neighbors for food, and once was seen to obtain a crust to eat by concealing it with his feet. On different occasions she stated that she wished the child was dead, that she would whip or kill him, and that he ought to be in his grave. On the morning of the death, the child was sent to the spring for water. He was slow in returning, and defendant went for him. She beat him severely over his hands—only partially healed from the burning which they had received—with a barrel hoop, until the blood was running from them; she then threw water over them, and, putting a bucket on his head, told him to carry it. He was too weak to do so, and defendant took the bucket herself, caught him by the wrist, and pulled him after her up the hill; when she turned him loose, he fell several times on the road to the house. After arriving there, he lay down and began to cry, and began to catch at things near him, as if in a fit. Defendant administered balsam and whisky; he bit a piece from the glass; she threatened to have him carried to the poor-house, if he did not hush. He was frightened, and ran under the bed; she dragged him out, and put him on his pallet. Those present went into the next room and left him there. After a while, the noise ceased; the child was quiet. He was dead.

The evidence for the defendant went to show that the child was diseased, had hereditary syphilis, causing the sores which were on his head and body, which would run and heal; that her treatment of him was not cruel, and that she provided sufficiently for him.

The jury convicted defendant, with a recommendation that she be imprisoned for life. She moved for a new trial on the following grounds:

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the court rejected the evidence of a witness offered to show that some time prior to the death of the deceased, when defendant exhibited to the witness the scars on the child's head, she made certain statements concerning them and their cause.

(3.) Because the court charged, without qualification as to *animus*, that if the conduct of the defendant did contribute to the death of the child, it was criminal, and she would be guilty of one or another of the crimes as mentioned,—murder, or voluntary or involuntary manslaughter; and if his death resulted either proximately or remotely from her conduct in the case, then she is guilty of some crime. [The court charged fully as to the presumption of innocence, reasonable doubts, etc., and after stating the position of the state and the defence, charged as follows:

“Judge of the testimony. Did the conduct of the defendant contribute, either proximately or remotely, to the death of this individual? Did his death ensue from disease of any kind, either congenital syphilis or other disease? Did it ensue from natural causes? If so, she is not guilty. But if it ensued from her own conduct, by a long continuation of conduct on her part, in which she maltreated the deceased, in which she beat him or starved him, as charged in the indictment, or exposed him to severe and inclement weather without sufficient clothing and food, as charged in the indictment, and if his death was brought about by a long series of acts of that character, and by nothing else, then you would be authorized to say she is guilty. The indictment charges that starvation is one of the elements that entered into the causes of his death. For one to be guilty of starving another, that one must have the means to supply the person with food, and intentionally and wilfully withhold it, in order to make out a case of starvation. If a person be poor and destitute, lacking in means, lacking in provisions, and by that

means a person under her control suffer from want of food, is not starvation; it is not criminal starvation, at all events it is not such as the law pronounces as criminal. If you find that the conduct of the defendant did contribute to the death of the child, then it would be your duty to inquire what grade of crime the defendant committed. Was it murder, voluntary manslaughter or involuntary manslaughter? If the conduct of the defendant did contribute to the death of the child, it was criminal, and she would be guilty of one or the other of these crimes as mentioned,—murder, voluntary manslaughter or involuntary manslaughter.”

He then charged fully as to the different degrees of homicide.]

The motion was overruled, and defendant excepted.

C. P. CRAWFORD, by brief, for plaintiff in error.

C. ANDERSON, attorney general; ROBERT WHITFIELD, solicitor general, by J. H. LUMPKIN, for the state.

HALL, Justice.

1. “Death ensuing in consequence of the wilful omission of a duty will be murder; death ensuing in consequence of the negligent omission of a duty will be manslaughter.” In *Rex vs. Hughes*, Lord Campbell, delivering the opinion of the court of criminal appeal, said: “It has never been doubted that, if death is the direct consequence of the malicious omission to perform a duty, as of a mother to nourish her infant child, this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter.” Roscoe’s Cr. Ev., 723, and cases cited. Where a sick or weak person is exposed to cold, with an intent to destroy him, this may amount “to wilful murder, under the rule that he who wilfully and deliberately does any act which apparently endangers another’s life, and thereby occasions his death, shall, unless he clearly prove to the contrary, be adjudged to kill him of

malice prepense." *Ib.*, and citations. Cases have arisen under this principle, where apprentices and prisoners have died in consequence of the want of sufficient food and necessities, and where the question has been, whether the law would imply such malice in the master or jailer as is necessary to make the offence murder. A husband and wife were both indicted for the murder of a parish apprentice bound to the former. Both the prisoners had used the deceased in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that, in his opinion, the boy died from debility and want of proper food and nourishment, and not from the wounds he had received. Lawrence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with food, she being the servant of the husband, and so directed the jury, who acquitted her, but the husband was found guilty and executed. *Ib.*, 724 and citations.

"Huggins, the warden of the Fleet, appointed Gibbons his deputy, and Gibbons had a servant, Barnes, whose duty it was to take care of the prisoners, and particularly of one Arne. Barnes put him into a newly-built room, over a common sewer, the walls of which were damp and unwholesome, and kept him there forty-four days without fire, chamber-pot, or other convenience. Barnes knew the state of the room, and for fifteen days, at least, before the death of Arne. Huggins knew its condition, having been once present, seen Arne, and turned away. By reason of the duress of imprisonment, Arne sickened and died. During the time Gibbons was deputy, Huggins sometimes acted as warden. These facts appearing on a special verdict, the court were clearly of opinion that Barnes was guilty of murder. They were deliberate acts of cruelty and enormous violations of duty reposed by the law in the ministers of justice, but they thought Huggins not guilty," because he had only seen the deceased once during his

confinement, and that, from this alone, it could not be inferred that he knew that his situation was occasioned by improper treatment or that he consented to its continuance. He knew nothing of the circumstances under which deceased was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessities of life. "It was also material that no application had been made to him, which, perhaps, might have altered the case." *Ib.*, 725.

Where the death ensues from incautious neglect, however culpable, rather than from any actual malice or artful disposition to injure, or obstinate perseverance in doing an act necessarily attended with danger, regardless of its consequences, "the severity of the law," says Mr. East, "may admit of some relaxation, but the case must be strictly freed from the latter incidents." 1 East's P. C., 226; Roscoe's Cr. Ev., 726. These citations have been made almost at random from a vast number of similar cases scattered through the elementary treatises on criminal law and the reports of the decisions upon the subject. The distinction so clearly pointed out by them is made by our own Code, §4327, which provides that where an involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, the offence shall be deemed and adjudged to be murder.

In the case at bar, this law was admirably illustrated in the able, clear and carefully prepared charge which judge Lawson gave the jury. Every phase of the case was presented; nothing was omitted that should have been presented, and nothing was presented that ought to have been left out; at least, nothing of which the prisoner could complain.

The only exception which the ingenuity and learning of able and zealous counsel could find to it was, that there was error in not "qualifying it as to the *animus*; that, if the conduct of defendant did contribute to the death of

the child, it was criminal, and she would be guilty of one or the other of the crimes mentioned,—murder, voluntary or involuntary manslaughter,” and “if his death resulted, either proximately or remotely, from her conduct in the case, then she is guilty of some crime.” When taken in connection with the context, it will be readily seen that this exception is not well founded. The charge is full and explicit as to the *animus* required to constitute crime in the accused.

2. There was no error in rejecting the sayings of the defendant made during the continuance of the cruel treatment of the deceased, when offered by her to account for the scars and other marks of violence and hard usages which appeared upon his person. She could not be permitted thus to fabricate testimony in her own favor. *Mitchell vs. The State*, 71 Ga., 128.

3. This verdict was not only sustained, but, in our opinion, required by the evidence. We cannot enter into its heart-sickening and revolting details, nor do we trust ourselves to characterize it by any general description, lest we might appear to be indulging in invective and denunciation, rather than temperate and measured reflections, indispensable to judicial fairness or calm deliberation. The jury, in recommending that she be imprisoned in the penitentiary for life, “seasoned justice with mercy,” which, if not perverted and misapplied, was at least “strained to its utmost tension.” If they erred at all, they erred on the side of safety; perhaps in deference to her sex, and because they thought it was better that ninety-nine guilty persons should escape than that one innocent person should suffer. They were more lenient to her than she seems to have been to this dependent and helpless child.

Judgment affirmed.

The Georgia Chemical, etc., Company vs. Colquitt et al.

THE GEORGIA CHEMICAL, etc., COMPANY vs. COLQUITT *et*

If a public nuisance causes special damage to an individual, in which the public do not participate, such special damage gives a right of action; and as an action may be brought for every day the nuisance continues, equity, which abhors a multiplicity of suits, will entertain jurisdiction, so as to do full and complete justice between the parties and terminate the litigation.

February 2, 1884.

Nuisance. Damages. Injunction. Equity. Before Judge HAMMOND. Fulton Superior Court. October Term, 1882.

Reported in the decision.

JULIUS L. BROWN; ABBOTT & GRAY, for plaintiff in error.

CANDLER & THOMSON; B. H. HILL, for defendant.

BLANDFORD, Justice.

The question here is, can a court of equity restrain a public nuisance which causes special damage to individuals?

The bill alleges that plaintiffs in error are engaged in manufacturing sulphuric acid near their residences and families; that it causes their shade, ornamental trees and shrubbery to die; causes sickness, coughs, etc., in and among their families and children; it emits the most poisonous and noxious vapors, etc.

If a public nuisance causes special damage to an individual, in which the public do not participate, such special damage gives a right of action. Code, §2998. The action may be brought for every day the nuisance continues; equity, abhorring a multiplicity of suits, will entertain jurisdiction, so as to do full and complete justice between the parties, and prevent a multiplicity of suits, thus ending litigation and contention. But this is not an open ques-

Hughes et al. vs. Hughes et al.

tion in this court. See *Norwood vs. Dickey*, 18 Ga., 528; *Minor et al. vs. De Vaughn*, decided at the present term of this court.

There is equity in the bill filed by defendants in error, and the decree of the court below overruling the demurrer thereto is right, and the same is affirmed.

Judgment affirmed.

HUGHES et al. vs. HUGHES et al.

1. A motion in arrest of judgment is unknown to courts of equity, and exceptions based on the denial of that motion cannot avail the plaintiffs in error.
2. Objections to a bill in equity for want of parties must be made by special demurrer; a general demurrer for want of equity will not embrace them.
3. If there was error in not considering the general demurrer, it did not hurt the plaintiff in error, because there is equity in the bill, and if considered, it should have been overruled.
4. On a bill for specific performance of a parol agreement or gift of lands by father to son brought against the claimants of a year's support, as the family of the father, and by the heirs of the son, the sayings of the father and of his widow, who is the defendant in the bill, claiming the year's support for herself and minor children, are admissible in behalf of the son's heirs; and the administrator of the son not being a party of record, and in no wise interested, is a competent witness to prove those sayings. 54 Ga., 624.
5. Objections that the verdict is contrary to the charge of the court, however specifically set out, are equivalent to an objection that the verdict is contrary to law, and are embraced in that single objection, for if the charge be not law, the verdict will be upheld, though against the illegal charge.
6. Under the Code of Georgia, any person who swears to his knowledge of hand-writing may give his opinion thereon, to be weighed by the jury. Code, §3839.
7. Exclusive possession of lands of the father by the son for seven years is conclusive presumption of a gift, and conveys title to the son, unless the latter disclaims title, or the evidence shows a loan, or claim of dominion by the father acknowledged by the son, and it is for the jury to say whether the evidence be sufficient to show such exclusive possession, without disclaimer or loan or dominion, each point to be settled by the weight of the evidence thereon. Code, §3834.

Hughes *et al* vs. Hughes *et al*.

8. Though a specific performance will not be decreed on a mere voluntary agreement or gratuitous promise, yet if possession be given under such agreement or gift, upon a meritorious consideration such as blood or close relationship by affinity, and valuable improvements be made on the land by reason of faith in that promise or agreement, the performance thereof will be decreed, and slight improvements, if of a valuable and permanent character, will suffice. Code, §3189; 33 *Ga.*, 9; 54 *Id.*, 624.
9. In the former adjudications upon facts disclosed in this record, no principle antagonistic to the views above was decided. The cases then were either between judgment creditors of the father, whose liens attached before seven years possession by the son, or where, for lack of power to make proper parties at law, a specific performance could not be decreed. The issue now is made for the first time, whose was the title at the death of the father,—was it in him or in the son? If in the father, his family are entitled to a year's support out of it; if in the son, they are not; or if, at the father's death, the son was entitled to a specific performance, they are not. 59 *Ga.*, 136; 67 *Id.*, 19; 70 *Ga.*, 273.
10. The verdict is supported by evidence, not only parol, but written; the charge and refusals to charge embody practically the points herein ruled, and no material error appears; the judgment overruling the motion for a new trial is therefore right.

Judgment affirmed.

December 4, 1883. (Head-notes by the court.)

JACKSON, Chief Justice.

[Martha E. Hughes, widow of George W. Hughes, in behalf of herself and minor children, filed a bill against Mary L. Hughes, Wilberforce Daniel, sheriff of Richmond county, and Thomas M. Berrien, administrator of William W. Hughes, of Burke county. The bill alleged, in brief, that William W. Hughes owned, besides much other property, a tract of land known as the Hughes "Summer Place," and desiring to make provision for his son, George W. Hughes, gave it to him in 1865; that the son went into possession under this gift, and so remained until his death in 1872, and complainants have since so continued; that there is no indebtedness against the estate of George W. Hughes, and complainants are his only heirs at law; that he claimed the place as his own, and made no payment of

rent to his father, who also recognized it as belonging to him; that the son erected substantial improvements upon the property; that both the father and son had died in 1872; that the widow of the father, Mary L. Hughes, had applied for a twelve months' support, and \$3,000.00 had been awarded to her, to which award exceptions were filed; that certain lands in Burke county had been sold, and the money brought into court for distribution; that she received by agreement \$1,500.00, and permitted the balance to be distributed among the creditors of her husband; that, in spite of this, she obtained an execution for the balance of her twelve months' support against the administrator of her husband, and caused it to be levied upon the "Summer Place." The prayer was for injunction to prevent the execution from proceeding against the "Summer Place" and for specific performance of the parol gift of the decedent. Discovery was waived.

The answer denied all the material allegations of the bill, especially that the widow had waived or renounced any claim on account of the year's support, or that the son held the property under a gift from his father; but asserted that his possession was merely permissive, and that the improvements he had placed upon the land were only such as to make it available to him in making a support, and were not made with reference to any parol gift or contract.

It is unnecessary to set out the evidence in detail.

The jury found for the complainants. Defendants made a motion in arrest of judgment, and also a motion for new trial. Among the grounds taken were the following:

(1.) Because a general demurrer to the bill for want of equity was on file and undisposed of at the time of the trial.

(2.) Because the verdict was contrary to various charges of the court specifically set out.

(3.) Because the court refused to give the following requests in charge: "Nor can complainants recover, if

there is evidence of loan, or claim of dominion of the father acknowledged by George, or known to George and acquiesced in by him, either in express terms or by silence, after hearing of his father's claim of dominion."

"There is no such thing as a parol title to land in Georgia, and if a party seeks to show title by possession without payment of rent, etc., under section 2664 of the Code, and his evidence shows, or he admits, that he never had written title, that is a deed, he cannot establish his claim under said section of the Code."

"To entitle a complainant to a specific performance of a parol contract for the sale of land, the contract must first be established with reasonable certainty, and the consideration claimed to have been paid or rendered therefor must be clearly and satisfactorily proven to have been paid or rendered in pursuance of that contract; otherwise, a specific performance of the alleged contract should be refused."

"A parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly and satisfactorily as to leave no reasonable doubt as to the agreement; it is a serious matter to substitute a parol sale of real estate for a deed."

(4.) Because the court charged as follows: "Exclusive possession by a child of lands originally belonging to a father, without payment of rent, for the space of seven years, shall create conclusive presumption of a gift, and convey title to the child, unless there is evidence of a loan, or claim or dominion by the father acknowledged by the child. If you believe, therefore, from the evidence, that George W. Hughes went into exclusive possession of this land, and remained there seven years during the lifetime of the father, without payment of rent or claim of dominion by the father acknowledged by the child, then this is conclusive presumption of a gift of the land and conveys title; and if you find this to be true, you will find for the complainants. Again, if you believe from the evidence that William W. Hughes made a verbal gift of the

land levied on to his son, George W. Hughes, who went into possession of the same and has made valuable improvements upon the faith thereof, he is entitled to a decree requiring the administrator to specifically perform his contract; and if you so find, you will decree by your verdict that the administrator be required to execute titles to this land to complainants.

(5.) Because the court erred, over defendants' motion to require complainants to make the administrators parties complainants, in allowing the case to proceed with no other complainants named in the bill but the widow of George Hughes, for herself and as next friend of her children, when it was true that the administrators were still in office, never having been dismissed from the administration, as shown by the evidence, and there was no evidence of the assent of the administrators that the heirs of George W. Hughes might bring suit in their own right.

(6.) Because the court allowed, over objection of defendants' counsel, the evidence of Walter A. Clark, one of the administrators of George W. Hughes, which testimony was as to what Mrs. Mary L. Hughes said to him about William W. Hughes giving the place to George, and her desire on that subject. [The objection was that the testimony was irrelevant and tended to prejudice the minds of the jury.].

(7.) Because the court admitted a letter purporting to have been written by William W. Hughes, upon the following proof alone: Walter A. Clark, sworn, said, "I think that the letter and signature are the hand-writing of William W. Hughes; I recognize that as his hand-writing; I never saw him write, and I never received any letters from him; I have seen writing of his; I did not know it to be his hand-writing, but others told me it was his writing; my opinion of his writing is based on writings which others have told me was his hand-writing, and in that way I got my knowledge of his hand-writing, and recognize this letter as his." The court asked the witness,

Heard, executor, *et al.* vs. Palmer, administrator.

Walter A. Clark, if he recognized this letter as the handwriting of W. W. Hughes, and witness answered, he did. Whereupon the court admitted the letter as evidence.

(8.) Because the court erred, after reading sections 2664 and 3189 of the Code, in concluding his charge, in substance, as follows: "And now, gentlemen, I charge you that if you find that William W. Hughes gave the 'Summer Place' to his son, George W. Hughes, and he went into possession of it without payment of rent for seven years, as contemplated in section 2664 of the Code, then you would be authorized to find for complainants; or if George went into possession of the land, as contemplated by section 3189, and made valuable improvements thereon, then it matters not whether he remained on it seven years or not; this of itself was sufficient to give him the right to a specific performance, and you will so find."

(9.) Because the verdict was contrary to law and evidence.

Both the motion in arrest of judgment and the motion for new trial were overruled, and defendants excepted.]

HEARD, executor, *et al.* vs. PALMER, administrator.

1. P. conveyed certain land to H.; subsequently he filed his bill to set aside the deed, on the ground that it was obtained by fraud; pending the bill, H. agreed with P. that, if the latter would dismiss the bill, he should have the land after his (H's) death, and H. should make him a deed to the same; the bill was dismissed. The deed being lost, it was proved by parol that it gave one-half at the death of H. to P. and the balance to one S. H.; no possession was given to P.:

Held, that, while he might be entitled to have specific performance of the contract, the title did not vest in P. until it was performed, either by the proper execution of deeds of conveyance or the delivery of possession; until then, he could not recover the land in an action at law.

2. The paper proved in this case was testamentary in its character, and having neither been properly executed as a will nor probated as such, it conveys no title.

Judgment reversed.

January 15, 1884.

BLANDFORD, Justice.

[Pettus brought complaint for land against Chase, setting out as his abstract of title the title of Stephen Pettus and descent from him to plaintiff, who was his son; also a conveyance from John W. Heard. Plaintiff subsequently amended his declaration by alleging that, while Chase was in possession, B. W. Heard, executor of John W. Heard, and Stephen Heard were the real defendants; he also alleged the conveyance by him to John W. Heard, the filing of the bill by him, the compromise, and the making of the conveyance as stated in the first head-note. The defendants pleaded the general issue and prescription. The jury found for plaintiff. Defendants moved for a new trial, which was refused, if plaintiff would renounce the recovery as to one-half interest in the land. This was done, and the motion overruled. Defendants excepted.]

STOKES et al. vs. WEEMS et al.

The bill is replete with equity; and the court having jurisdiction by reason of the equity therein, may grant an injunction as ancillary thereto, to restrain a mere trespass. The exercise of this power by the chancellor, in view of the bill and answers thereto, was not error.

Judgment affirmed.

October 2, 1883.

BLANDFORD, Justice.

[A bill was filed, alleging that, on a suit against a trustee in his individual capacity, he confessed judgment, and judgment was improperly entered against the trust estate; two executions were issued, one generally against the trust estate and the other against certain specific property; that certain land was levied on and sold and bid in by the plaintiff and another confederating with him, at a nominal sum; that the trustee tendered an affidavit of illegality to

Williams vs. The State.

the sheriff, who only rejected it late in the evening of the day before the sale was made; that defendants had caused the sheriff to re-sell certain of the lands under a tax *fi. fa.* for a small sum, and bid them in. The bill was for the purpose of cancelling the deeds, judgment and *fi. fa.* against the trust estate, to redeem the lands sold for taxes to enjoin the sheriff from making deeds to plaintiff in *fi. fa.* and his confederate to the lands bid in by them at the sale, and to enjoin interference with the possession.

Defendants demurred and answered. The answer insisted on the validity of the claims against the trust estate.

The chancellor granted the injunction, except as to the lands sold for taxes, and refused it as to them, unless the complainants should pay to defendants the amount paid therefor by them with ten per cent thereon.

Defendants excepted.]

WILLIAMS vs. THE STATE OF GEORGIA.

1. Different counts charging offences of the same nature may be joined in one indictment. 52 *Ga.*, 565; 43 *Id.*, 218; 11 *Id.*, 94; 5 *Id.*, 449.
- (a.) That an indictment included a count for assault with intent to murder and one for aiming and pointing a pistol at another, did not render it so defective that it should be quashed on motion *ore tenus*. Code, §§4639, 4629.
2. If grand jurors are qualified when they are drawn, they may serve, although their names may be left out of the jury-box on a revision made before they are empanelled. 64 *Ga.*, 443; 70 *Id.*, 765.
3. Evidence showing a part of the *res gestæ* of the transaction on which an indictment was based, was admissible.
4. The verdict was required by the evidence.

Judgment affirmed.

December 4, 1883.

HALL, Justice.

[Enoch Williams was indicted; one count in the indictment was for assault with intent to murder, and another

for pointing a pistol at another. Defendant moved to quash the indictment, as containing a misjoinder of counts. The motion was overruled. Defendant filed a plea in abatement, on the ground that four of the grand jurors who found the indictment were not qualified at that time to act. It was agreed that, at the time the grand jurors were drawn, they were qualified, but that a revision of the jury-box had been had and their names omitted before the indictment was found. The court struck the plea, on motion.

It is unnecessary to set out the evidence in detail. The jury found for the defendant guilty on the first count. He moved for a new trial, on the following among other grounds:

(1.) Because the court refused to quash the indictment.

(2.) Because the court struck the plea in abatement.

(3.) Because the court permitted the witness, R. J. Courtney, over the objections of defendant, to testify that while the train of cars was on the way from Millen to station 7 $\frac{1}{2}$, the car-bell was being rung, and he (Courtney) went back into the negro car, and found that it was defendant ringing the bell, whose hand was then on the bell-rope, and that defendant was under the influence of liquor and acting in a disorderly manner, and was ordered by him (Courtney) to cease ringing the bell.—This testimony was objected to on the part of the defendant, upon the ground that the same was irrelevant. [The testimony for the state showed that the defendant was drunk and disorderly on a train on which Courtney was the conductor; that he was told he would be put off if he did not desist; and that, on leaving the train, he fired at Courtney.]

(4.) Because the verdict was contrary to law and evidence.

The motion was overruled, and defendant excepted.]

THE SOUTHWESTERN RAILROAD vs. HANKERSON.

When this case was first before the Supreme Court (59 *Ga.*, 593), was held to be a question for the jury to decide, whether plaintiff was drunk and his powers failed from that cause, or from a sudden access of disease. When here a second time (61 *Ga.*, 114), it was held that, if he voluntarily became drunk and fell or lay down in a state of insensibility on a railroad track, so that he was injured by a passing train, he could not recover for injuries so received, even though there may have been negligence on the part of the railroad company. On the last trial, the question whether the plaintiff was voluntarily drunk, and in that condition placed himself on defendant's road, or whether he had a sudden access of disease, by reason of which he fell upon the railroad, and was injured by the negligence of the defendant's agents in running its trains, was fairly submitted to the jury, and there is no exception to the charge. There was sufficient evidence to carry the case to the jury and to uphold their finding.

Judgment affirmed.

October 2, 1883.

BLANDFORD, Justice.

[This case has been to the Supreme Court twice before, and will be found reported in 59 *Ga.*, 593, and 61 *Id.*, 114. On the argument this time, no question was made as to the accident, but it was insisted that plaintiff had become voluntarily drunk and had placed himself on the track, and was not, therefore, entitled to recover. Plaintiff admitted that he had drunk some whiskey, but denied being drunk; said he was subject to attacks of vertigo, and that such a sudden access of disease caused him to fall upon the track. The witnesses for the defence considered him drunk. The jury found in his favor \$550.00.]

MASLAND, JR., vs. KEMP *et al.*

1. Upon the hearing of an application for injunction in vacation, the only use which could be made of a plea of *res adjudicata* was for the evidence it afforded to justify the refusal of the injunction prayed for. The chancellor could pass no order finally disposing of the plea.

Masland, Jr., vs. Camp et al.

2. The bill made no case for an injunction. It did not appear that either of the defendants was insolvent or likely to become so; the landed property sought to be subjected had not changed hands since the commencement of this litigation; and if ever subject to the claim, it still remained so; the pendency of the bill was notice to any one who might purchase; the defendants denied notice of complainant's equity when they purchased and paid for the property; the answer swore off the equity of the bill, and no rebutting testimony was offered at the hearing.

Judgment affirmed.

February 2, 1884.

HALL, Justice.

[Masland filed his bill against Kemp et al., alleging that certain trust funds had been improperly invested by the trustee in his own name; that he had made a conveyance of the lots so bought to secure a pretended debt of his own, and died insolvent; that subsequently the lots were reconveyed to a trustee for his widow and daughters; that, by a collusive arrangement between the family and the attorney holding certain *fi fas.*, the lots were levied on as the property of the deceased husband and father, and sold at sheriff's sale, and bid in by the attorney; that the attorney was to pay off the judgments and divide the balance of the property with the family; that the sheriff was notified to hold up the money to be paid to the claim of the trust estate, but he nevertheless receipted to the attorney for the money, and made him a deed, though in fact no money was paid; that part of the land had since been sold, and the attorney had made a deed to the balance to a trustee for the widow and children. The bill prayed for an injunction to prevent the payment or distribution of the fund arising from the sheriff's sale, and to subject it to the claim of the trust estate, and also to have the various conveyances above stated set aside, and to recover the property, and have an accounting for rents.

Defendant pleaded *res adjudicata*. (See this case decided earlier in the present term of the Supreme Court.)

Cruse vs. The Southern Express Company.

The answer denied all collusion or knowledge of the claim of the trust estate, but alleged that the sheriff's sale was regular and fair, and the attorney of plaintiff in *fi. fa.* who bought the property, receipted to the sheriff for the amount, and paid the costs; that he then offered to let his clients have the land, which they declined, and he made an arrangement with them for credit till the succeeding fall; that none of the money was in the hands either of the sheriff or of the attorney.

The case was heard in vacation. The judge refused the injunction, and also declined to overrule the plea of former recovery. Complainant excepted.]

CRUSE vs. THE SOUTHERN EXPRESS COMPANY.

Where the facts on which the judgment of a justice is rendered are contested, a *certiorari* will not lie directly therefrom; there must be an appeal, and from the finding of the jury (the case involving less than \$50.00) a *certiorari* may be taken. But where no facts were contested before the justice, and the exception is that, conceding all the facts, the judgment was erroneous, a *certiorari* may be taken directly from such judgment. 63 Ga., 405.

Judgment affirmed.

December 4, 1883.

HALL, Justice.

[On May 2, 1881, Cruse obtained a judgment in attachment against one Bonnie Meyer for \$71.09, principal. Pending the suit, garnishment issued and was served on the Southern Express Company, which answered, on May 2, 1881, that it had no property of Bonnie Meyer in its possession, except that it had a trunk and package, which it had received with instructions to deliver to Bonnie Meyer, alleged by garnishee to be identical with one Mrs. J. H. Thorne, on payment to garnishee of \$82.90, amount of a judgment alleged by garnishee to have been obtained on June 13, 1880, in the court of common pleas of Washington county, Pennsylvania, by Richard E. Frazier & Son

James vs. Benjamin.

vs. Mrs. J. H. Thorne, J. H. Thorne and Mary Mortimer; that said trunk and package are not the property of said **Bonnie Meyer**, and cannot be, until she pays said judgment and \$13.95 express charges, which she has refused to do.

On July 5, 1882, plaintiff's counsel and the superintendent of the company appeared in the justice's court, which, having before it plaintiff's judgment of May 2, 1881, against Bonnie Meyer for \$71.90, the answer of garnishee and the testimony of said superintendent that defendant had in its possession a trunk and package marked "Bonnie Meyer," and made no claim thereto except for express charges thereon, rendered judgment in favor of plaintiff against the garnishee for said property as the property of Bonnie Meyer,—defendant to receive its said charges. The garnishee was not represented by counsel in the justice's court.

Defendant carried the case to the superior court by *certiorari*. Counsel for plaintiff moved to dismiss the *certiorari*, on the ground that the question was one of fact. The motion was overruled, and plaintiff excepted.]

JAMES vs. BENJAMIN.

1. A distress warrant will not lie for rent until the same is due, unless the tenant is removing his goods from the premises or seeking to do so. Code, §2285.
2. A note payable on or before a certain day is payable on that day, so far as the maker is concerned. He may pay it before, if he wishes, but may put it off until the day named. There is no ambiguity about its legal effect, and parol testimony is inadmissible to vary its import, or show that it is to be paid before the day named.

Judgment affirmed.

October 16, 1882.

JACKSON, Chief Justice.

[On August 29, 1881, James sued out a distress warrant

Hammond vs. The County of Richmond.

1979 of the Code is in derogation of common law, and its requirements must be strictly followed.

Judgment reversed.

December 21, 1883.

HALL, Justice.

[Defendant demurred to the declaration in this case, on the ground that it showed that no notice of the claim of lien had been given to the owner of the land. This was overruled, and a verdict rendered for the plaintiff. A motion for new trial was made, and refused; and defendant excepted.]

HAMMOND vs. THE COUNTY OF RICHMOND

The county is not responsible in damages for the tort of one of the guards, in unlawfully beating a convict in the chain-gang, nor for the negligence of the rest of the guards in not protecting the convict from the unlawful beating. 2 T. R., 667; 15 *Ga.*, 316; 18 *Id.*, 475; 19 *Id.*, 100; 20 *Id.*, 846.

(a.) In cases where the statute provides for the liability of counties, a recovery may be had against them; as when no sufficient bond is taken to keep bridges in repair. Code, §§491, 691; 41 *Ga.*, 229; 58 *Id.*, 832; 64 *Id.*, 69.

December 4, 1883. (Head-notes by the court.)

JACKSON, Chief Justice.

[Hammond brought suit against the county of Richmond, alleging that he was a convict in the county chain-gang; that he was under the charge and custody of certain guards, who were servants employed and paid by the county, and whose duty it was to treat him with humanity and to protect him; that one of the guards cruelly beat him without cause; that he appealed for protection to another guard in charge, but failed to receive it. He insisted that the county was responsible both for the injury inflicted by one guard, and for the failure of the other to protect him.

On demurrer, the case was dismissed, and plaintiff excepted.]

RUMPH vs. CLEVELAND.

1. Exceptions to the answer of a justice of the peace to a writ of *certiorari* must be in writing, must specify the defects complained of, and notice thereof must be given to the opposite party before the case is called for a hearing; but the statute does not require that such exceptions should be verified by affidavit, or that they should be disposed of at the term when they are filed. Code, §§4062, 4063; 40 Ga., 36; 64 *Id.*, 576; 65 *Id.*, 280.
 - (a.) The case in 26 Ga., 414, was decided before the Code went into effect.
 2. That the record does not show that notice of the exceptions was given before the calling of the case, cannot be urged for the first time in this court, no such question having been made in the court below. The statute does not prescribe the form or manner of notice. It may have been given or waived.
- Judgment reversed.

October 18, 1883.

HALL, Justice.

[Rumph sued Cleveland in a justice's court, and obtained judgment. The case was carried to the superior court by *certiorari*. At the first term it was called, and defendant in *certiorari* filed exceptions to the answer thereto because it did not fully set forth the testimony. At the next term, when the case was called, plaintiff in *certiorari* moved to dismiss the exceptions because they were not sworn to. The court sustained the motion and dismissed the exceptions, giving as an additional reason therefor that defendant in *certiorari* did not at the first term take an order requiring the justice to re-answer. The *certiorari* was sustained, and the defendant therein excepted.]

WOOD et al. vs. HAINES.

1. On proof of title in a minor, he may recover, though letters of guardianship be not produced, and the suit be in the name of the guardian. Code, §3263; *Ansley vs. Jordan*, 61 Ga., 488. Title on the death of the ancestor vests in the heir, and not in the guardian, if there be one. If none, or letters not produced, and guardian
- may, court should appoint.

Wood *et al.* vs. Haines.

2. Possession by the heirs under the ancestor, of lands, in the possession of which he died in 1863, in the war, up to the filing of the writ, or a short time before, is such title as will entitle the heirs to recover, the defendant showing none.
 3. The record does not show to whom the sheriff's deed was made, or who bought the land under the justice court *fi. fa.* ; therefore, no error appears in ruling out the deed and *fi. fa.*
- Judgment reversed.

December 4, 1881. (Head-notes by the court.)

JACKSON, Chief Justice.

[W. H. Wood, C. M. Wood, Ella E. Wood, and Ella E. Wood, as guardian of Emmett B. Wood, brought complaint for land, against Haines in 1881. Plaintiffs' abstract of title set out that they were the only heirs of W. M. Wood, deceased. On the trial, they showed that the decedent was in possession at the time of his death in 1863; that plaintiffs were his only heirs; that they had remained in possession from the date of his death until ousted by defendant; and that there had been no division of the estate. Defendant introduced no evidence. The jury found for the plaintiffs. Defendant moved for a new trial, on the grounds, among others, that the verdict was contrary to law and evidence; that the court refused to grant a nonsuit, and charged to the effect that possession in the ancestor, at the time of his death, and possession since by his family, would warrant a recovery, in the absence of any proof of title by the defendant; because Mrs. Ella E. Wood recovered as guardian of Emmett Wood, though no evidence of the guardianship was produced to the jury; and because the court rejected from evidence the justice court *fi. fa.* under which the land was sold, and the sheriff's deed based thereon. (These are not set out in the record.)

The motion was overruled, and defendant excepted.]

NICHOLS vs. THE STATE OF GEORGIA.

1. This court is not satisfied with the verdict in this case. The charge was rape; the verdict was assault, based upon improper exposure of a female patient's person by her doctor, under false and fraudulent statements of the necessity therefor. The evidence should have been as clear and satisfactory as would have been necessary to convict of rape. It was not so.
 2. While the court should give the law of the case in charge, yet he should be careful not to press an untried issue, without warning to the defendant or notice of it to his counsel, giving it in his last charge to the jury.
 - (a.) Where the indictment was for rape, and that issue alone was tried, it was hardly fair to the defendant to charge and press upon the jury law to the effect that they might find a verdict of guilty of an assault, if the defendant was a physician and wrongfully exposed the person of a female patient.
- Judgment reversed.

September 11, 1883.

JACKSON, Chief Justice.

[Nichols was indicted for rape, alleged to have been committed upon one Mary Herndon. The defendant was a doctor. The prosecutrix testified that he pretended that it was necessary to use instruments in treating her, and so pulled up her clothing and had connection with her, holding her arms. The evidence was very conflicting. The woman claimed to have been assaulted appears to have made no outcry and no immediate complaint, though there were others in the house. Afterwards she made an affidavit that she was satisfied that she was wrong in her charges against defendant.

The jury found a verdict of guilty of an assault. Defendant moved for a new trial on the following, among other grounds:

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the issue was tried solely on the charge of rape; counsel so argued the case, and no point was raised

King vs. Davidson.

as to whether defendant might be convicted of assault. Counsel for defendant put upon notice that the issue would be tried until the charge of the court was given. The court charged, among other things, that if defendant was not guilty of rape, the jury might consider whether he was guilty of an assault; that if he took advantage of the relationship of physician and patient, and removed the garments of a female patient under threat and fraudulent pretence that he could not otherwise do so, of the case, it would be an assault. The court continued further in regard to this subject, and read from Greenleaf on Evidence upon the same.

The motion was overruled, and defendant excepted.

KING vs. DAVIDSON.

[Jackson, Chief Justice, did not preside on account of providential cause. This case is concluded by the judgment when it was here before (Ga., 708), and the matter is *res adjudicata*. After the remittitur had been returned from this court and made the judgment of the court below, it was error to allow exceptions to be filed by defendant. They came too late, and final judgment should have been rendered for the plaintiff.

Judgment reversed.

December 4, 1883.

BLANDFORD, Justice.

[When this case was formerly before the superior court, the judgment was as follows:

“The above stated case having been referred to a referee, report having been returned to the court, and it appearing that the referee misconstrued the order of reference taken by consent of the parties, further appearing that counsel will (not?) agree upon another order of reference, and it further appearing that counsel for plaintiff objected to said case being referred back to the referee with the order enlarged so as to express the intention of this court in the order of reference: It is ordered that said order of reference be set aside, and also that said case be placed upon the docket of this court and stand for trial at October term, 1882.”

Summers, ordinary, vs. Christian et al.

This judgment was reversed (See 69 Ga., 708). The remitter states that the court below "erred in vacating the order of reference, and setting aside the award, and not ordering the same to be made the judgment of the court."

When the judgment of the Supreme Court was made the judgment of the court below, the defendant filed certain exceptions to the award. Plaintiff moved to strike them, and to make the award the judgment of the court. This was refused, and plaintiff excepted.]

SUMMERS, ordinary, vs. CHRISTIAN et al.

Section 897 of the Code provides that the overplus arising from the sale of unreturned property for taxes shall be paid to the ordinary as a part of the educational fund, subject to the claim of the true owner within four years. In the present case, the action was brought by the purchasers at the sheriff's sale, but it did not appear what right they had to recover such overplus, whether by assignment from the true owner or otherwise.

(a.) It may be that the persons having charge of the disbursement of the educational fund might maintain an action against the ordinary for a misapplication of this fund, if not barred.

Judgment reversed.

November 16, 1883.

BLANDFORD, Justice.

[Christian, for the use of various parties, brought suit against Summers, the former ordinary, and his bondsmen, alleging that a *fi. fa.* had been issued by the tax collector of the county against a certain lot of land, said to belong to one Weldon, for taxes; that it had been sold by the sheriff, and after paying costs, the fund arising therefrom had been paid to Summers, as ordinary, on account of the school fund; that the owner of the land was an idiot from his birth, and the sale entirely void; that plaintiff bought at the sheriff's sale, and subsequently sold the land to the parties for whose use he sued, and that the title failed. He therefore claimed that the consideration had entirely

Rivers vs. Hood.

failed, and that he should recover the money so received by defendant.

On motion, all of the defendants were stricken except Summers. It is unnecessary to detail the evidence, further than to state that plaintiff introduced testimony to show that he had asked defendant in 1876 to hold the money, and the latter said he had it still in his hands, and would hold it. Defendant testified that the sale was in 1869, that he held the fund raised for four years, and no demand being made for it, and there being no school board at that time, he paid it out for the building of a county bridge. The case was submitted to the presiding judge without a jury. He rendered judgment for the plaintiff for \$369.93 principal, with interest. Defendant thereupon excepted.]

RIVERS vs. HOOD.

At the monthly session of the county court, it has jurisdiction of issues on distress warrants, where the amount of the principal does not exceed one hundred dollars, and at its quarterly session it has jurisdiction of such issues on distress warrants, where the amount is in excess of that sum, but not more than three hundred dollars, (except where the warrant is issued by the county judge himself). Therefore, where a notary public and *ex-officio* justice of the peace issued a distress warrant for two hundred and thirty-five dollars, returnable to the next term of the county court, it was properly returned, together with the counter-affidavit thereto, to the next quarterly session of the county court. Code, §§283 (f), 295; 60 Ga., 623

Judgment reversed.

February 2, 1884.

HALL, Justice.

[A distress warrant for \$235.00 was issued by a notary public and *ex-officio* justice of the peace, and made returnable to the next term of the county court. It was levied by a constable, and on defendant's making a counter-affidavit and giving bond, the officer returned the papers

Sutton vs. Robinson, for use etc.

to the next quarterly term of the county court, although a monthly term had intervened. The case was carried to the superior court by appeal. A motion was made to dismiss the warrant, because it was returnable to the monthly term of the county court. This motion was sustained, and plaintiff excepted.]

SUTTON vs. ROBINSON, for use.

1. Where a former sheriff had in his hands money belonging to a plaintiff, and failed to pay it over upon demand made therefor, he was liable, not only for the principal, interest and costs which he had collected on the plaintiff's *ft. fa.*, but also for the costs in the rule against him instituted by the plaintiff to recover the money.
 2. This case having been brought here for delay only, ten per cent damages on the principal sum of one hundred dollars are awarded against the plaintiff in error.
- Judgment affirmed with damages.

October 2, 1883.

[Robinson ruled Sutton, former sheriff, for the principal, interest and costs collected by the latter on a *ft. fa.* He answered the rule, and said he had the money in court, but refused to pay the costs of the rule. The court held him liable therefor, and made the rule absolute. He excepted.]

THE CHRONICLE AND CONSTITUTIONALIST vs. ROWLAND

An affidavit to obtain an attachment stated as follows: The affiant "on oath says that he is attorney at law in this matter for the Chronicle and Constitutionalist, a corporation chartered under the laws of said state, and that S. C. Giles is indebted to said Chronicle and Constitutionalist, to the best of his knowledge and belief, in the sum of one hundred and seventy-five dollars, with interest from April 12, 1881, and that the said S. C. Giles is not a resident of said state, but resides without the limits thereof:"

Held, that the words "to the best of his knowledge and belief" only qualified the statement as to the indebtedness, and did not qualify the other clauses of the affidavit, so as to render it insufficient.

(S.) This case differs from those in 80 Ga., 112, and 28 Id., 351.

Judgment reversed.

October 4, 1883.

BLANDFORD, Justice.

[Under the affidavit set out in the head-note, summons of garnishment was issued and served, and a bond was given to dissolve it. After judgment against the defendant on the bond, he moved to set it aside because of the insufficiency of the affidavit on which the attachment was based. The motion was sustained, and the plaintiff excepted.]

**MURPHY vs. THE TALLULAH STEAM FIRE ENGINE COMPANY
No. 3.**

A bill in equity cannot be dismissed on demurrer at a term prior to that to which the bill is made returnable. Code, §§4191, 4194.

(a.) Semble, that the act of 1863, which provides for the determination of a demurrer in vacation, contemplates a vacation subsequent the return term of the bill.

(b.) This case differs from that in 32 Ga., 670, 672.

Judgment reversed.

February 9, 1884.

JACKSON, Chief Justice.

[A bill was filed in Fulton superior court, returnable to the fall term, 1883, thereof. At the spring term, 1883, on demurrer, the bill was dismissed, and complainant excepted.]

DANIELS vs. EDWARDS & DUKES *et al.*

1. Although a lease of certain turpentine lands was made in 1877, and was for three years only, the time at which it was to begin not being specifically stated, but enough being set out to show that the parties may have intended it to begin at the time the trees in each lot were boxed, there being many lots, in two counties, if the lessor saw the boxing being done in the year 1882, and not only did not object, but urged that it be done, equity will estop him from setting up an adverse construction of the instrument, in orde

The Exchange Bank of Macon vs. Elkan

- to turn out the lessees, who, under his urging, expended their labor and capital in preparing for the turpentine business.
2. If this were not so, the defendants are able to respond in damages under a judgment at law, and those damages are as ascertainable as in cases of trespass in destroying the cultivation of land for crops, or other similar business—the quantum of damages turning on the amount of damage done and the estimate thereof, in the opinion of witnesses expert in, or acquainted with, such operations.
 3. The remedy at law to evict a tenant holding over is complete.
 4. The chancellor decides upon controverted facts, on applications for injunction, and this court does not interfere.
- Judgment affirmed.
September 18, 1883.

JACKSON, Chief Justice.

[Injunction was prayed to restrain defendants from trespassing on certain lands used for the manufacture of turpentine. Defendants claimed the right to use the lands under a lease, which they insisted had not expired. They also asserted their solvency. The injunction was refused, and complainant excepted.]

THE EXCHANGE BANK OF MACON vs. ELKAN.

Suit was brought in the county court of Bibb county. On the first day of the term, no litigated cases were heard, but judgments were rendered where no defences were set up. Counsel for plaintiff in this case stated that he desired a judgment in it. The court inquired if the case was defended, to which counsel responded in the negative, and the court permitted him to make out his case by proof, and rendered judgment for the plaintiff. No plea had been filed, and no name of counsel for defence had been marked on the docket. Later in the day, two attorneys who had obtained leaves of absence came into court, and announced that they had a defence to the suit; that they had conferred with counsel for the plaintiff, and that the understanding had with him was, that the case should not be heard until they had been advised. The judge of the county court, upon this statement, ordered that the judgment be opened, and that the defendant be allowed to plead:

Held, that this was error. No agreement of counsel is binding, unless in writing. No such agreement was shown, but the case was reinstated upon the mere verbal statement of counsel for one side. Nor

DeLoach vs. Trammell et al.

was it proper to pass such order without notice to opposing counsel, and thereby practically pronounce him guilty of bad conduct, without a hearing.

(a.) This court recognizes the distinction between a motion for new trial and a motion to set aside a judgment; and also a motion to arrest a judgment and one to set it aside. The rule is also recognized that judgments of a court of record are *in fieri*, at least until entered of record or on the minutes of the court, if not during the entire term. But if this were a motion to set aside a judgment, notice should have been given to the adverse party. Strictly speaking, this motion was neither a motion for a new trial, nor one to set aside a judgment, nor to arrest a judgment. It partakes rather of the nature of the first than of the others, not being predicated on what appears of record. It was, in fact, a matter of practice in the county court. Code, §3588; 53 *Ga.*, 91, 52; 55 *Id.*, 274. Judgment affirmed.

October 16, 1883.

JACKSON, Chief Justice.

[On *certiorari* to the superior court, the action of the judge of the county court in opening the judgment was set aside, and to this exception was taken.]

DELOACH *vs.* TRAMMELL *et al.*

Where an injunction case has been regularly entered on the docket of the term of this court to which by law it belongs, and on the call thereof has been dismissed for want of prosecution, it will not be reinstated, although it may be made to appear to the court that counsel had agreed for it to be returned to the next term, and were willing for the case to be reinstated, and although the judge's certificate to the bill of exceptions named the succeeding term as the one to which the record should be sent up
Motion to reinstate denied.

[DeLoach filed his bill against Trammell *et al.*, praying for an injunction. It was refused on December 29, 1883, and a bill of exceptions was tendered and signed the same day. The writ of error commanded the clerk to transmit the record to the next February term of the Supreme Court. It and the bill of exceptions were transmitted by

Platen, relator, vs. Adams, judge.

him to the clerk of the Supreme Court, and filed in the office of the latter on January 11, 1884, and entered on the docket of the then pending term, the September term, 1883. When the heel of the entire docket was reached, this case was called in its order, and dismissed for want of prosecution. Subsequently, counsel for plaintiff in error moved to reinstate the case, alleging that counsel for both parties had agreed that the case should be made returnable to the February term, 1884, and should not be advanced or disposed of before that time, and that the writ of error was drawn returnable thereto. Counsel for defendant in error admitted these facts, and joined in the request that the case be reinstated. The court refused to reinstate it.]

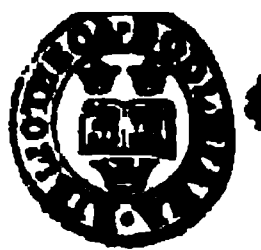
PLATEN, relator, vs. ADAMS, judge.

1. When a *mandamus nisi* has been issued to a judge of the superior court, requiring him to show cause why he should not sign a bill of exceptions, and in answer thereto he states that he has no evidence of the truth of the statement of facts contained in the bill of exceptions, and no proceedings have taken place before him by which he could verify them, the rule will be discharged.
2. Such an answer cannot be traversed. Code, §4258.
Rule discharged.

January 2, 1884.

JACKSON, Chief Justice.

[The bill of exceptions tendered to the judge recited transactions and litigation, covering a number of years, much of which was prior to the term of the judge then presiding, though the final order excepted to was made by him. On the return of the answer of the judge, the relator moved to be allowed to traverse it, but this was refused.]



Walker vs. The State of Georgia.—Beal vs. The State of Georgia.

WALKER vs. THE STATE OF GEORGIA.

1. The evidence in this case not only authorizes but requires the verdict.
2. The principles of law were correctly given and fully and impartially applied to the facts and circumstances in evidence. Every right of the defendant was carefully guarded, and the verdict was not contrary to the evidence.
3. The indictment being for assault with intent to murder, and the judge having fully instructed the jury under what circumstances they might find the defendant guilty of the crime charged, or of shooting at another, or of assault and battery, or of assault simply, there was no error in instructing the jury as to the form of their verdict, in case they should conclude that the defendant was guilty of assault and battery.
4. There was sufficient evidence to justify the conclusion that the pistol used in this case was loaded with powder and ball.
5. The credulity of witnesses is a question for the jury.
6. If evidence be admitted without objection, it forms no valid ground for new trial.

Judgment affirmed.

September 25, 1883.

HALL, Justice.

[Defendant was convicted of assault with intent to murder. He moved for a new trial, which was refused, and he excepted.]

BEAL vs. THE STATE OF GEORGIA.

1. There is ample evidence to convict the defendant of burglary, if the boy twelve years old (a witness) was not an accomplice. If coerced by fear of life or limb, he could not be an accomplice, because he could not commit a crime when so coerced. Code, §4303.
2. The court submitted the issue on that question as fairly for the defendant as could be asked by him, and the jury found that he was so coerced, under evidence enough to sustain the finding, the tender years of the boy being considered. Code, §§4294. 4295; 32 Ga., 496.

Judgment affirmed.

October 2, 1883. (Head-notes by the court.)

JACKSON, Chief Justice.

Neel, receiver, v. Field—Savannah, Griffin & North Alabama R. R. v. Shell; etc.

NEEL, receiver, *vs.* FIELD.

Where matters in controversy between two parties were submitted to arbitration, and the party in whose favor the award was made received money and notes of other persons from the opposite party, in full settlement thereof, knowing, at the time, that there was a mistake in the calculation by which the full amount of interest due him had not been allowed, he could not retain the amount received under the arbitration, and also sue for the balance claimed to be due by reason of the mistake. If he received the money and notes in full settlement under the award, after notice of the mistake, he must abide the settlement.
Judgment reversed.

November 23, 1883.

BLANDFORD, Justice.

THE SAVANNAH, GRIFFIN & NORTH ALABAMA RAILROAD
vs. SHELL.

A party applying for a writ of *certiorari* from a justice's court is required to produce a certificate from the justice that all costs which have been assessed on the trial below have been paid. This requirement is not met by producing a bill containing certain items of cost and a receipt showing that such itemized bill has been paid, but not showing that all the costs have been paid. Code, §4050; 70 Ga., 716.

Judgment affirmed.

November 6, 1883.

BLANDFORD, Justice.

HUDSON *vs.* THE STATE OF GEORGIA.

The evidence shows the plaintiff in error to be guilty as he was defendant: indeed, the testimony is so strong and

Stanley vs. The Richmond & Danville Extension Company : etc.

STANLEY vs. THE RICHMOND & DANVILLE EXTENSION
COMPANY.

A suit by a widow against a railroad for the homicide of her husband, the evidence for the plaintiff was as follows: The deceased was employed by defendant to work on a railroad; while so employed, one A., as "boss," directed him, together with other hands, to push certain cars loaded with iron, and directed them to stand on the side and shove them; the deceased voluntarily placed himself between two flat cars, and while they were being pushed and in motion, he fell; the car ran over his foot or leg, and from the injury so received he died. It did not appear when the deceased placed himself between the cars, that the "boss" knew he had done so, or what relation this "boss" sustained to the deceased and his associates:

Held, that the evidence failed to make out any case against the railroad, and a non-suit was properly awarded.

Judgment affirmed.

February 2, 1884.

BLANDFORD, Justice.

LEMAN vs. SAUNDERS *et al.*

This case is controlled by that of *Kleckley vs. Leyden*, 63 Ga., 215.

There was no abuse of discretion in refusing to grant a new trial on the ground that the verdict was contrary to law and evidence.

Judgment affirmed.

October 16, 1883.

BLANDFORD, Justice.

EDWARDS & DUKES vs. HARRELL.

Every material question in this case is covered by the opinion in the case of *Daniel vs. Edwards & Dukes et al.*, decided today.

Judgment affirmed.

September 18, 1883

ALL, Justice.

Moseley vs. Evans et al.—Harris, executor, vs. Butler.

MOSELEY vs. EVANS et al.

1. ~~Where~~ here it was sought to establish a copy in lieu of a lost will, and two of the three persons appearing as subscribing witnesses were sworn, in the absence of any attack on their credibility, evidence that they were men of good standing and entitled to credit, was inadmissible.
2. ~~The~~ The person whose name appeared as the third subscribing witness of having been sworn as a witness, evidence that he was a man of bad character, was unworthy of belief, and had made certain statements in relation to the matter, was inadmissible.
3. ~~Where~~ Where a paper purporting to be a copy of a lost original will was sought to be established and probated, the only evidence of the making of the will being the testimony of two of the persons whose names appeared as subscribing witnesses, the third person whose name so appeared being in court, but not sworn, and there being no evidence to show the existence of the will after the death of the testator, or that the will, if any existed, was lost or destroyed, a verdict against the paper so propounded was proper.

70 Ga., 333.

Judgment affirmed.

October 23, 1883.

BLANDFORD, Justice.

HARRIS, executor, vs. BUTLER.

1. On a careful examination of this bill of exceptions and the entire record, we are unable to find anywhere on or in either, both being attached to each other, any certificate by the clerk of the superior court that what is styled the bill of exceptions is the true original bill of exceptions, or any certificate at all about any paper in the entire package as the bill of exceptions. We have no jurisdiction, therefore, of the case, and it must be dismissed, there being here no legal writ of error.
2. On an examination of the record, it appears that the evidence required the verdict, and we are, therefore, less reluctant to dismiss the case.

Writ of error dismissed.

October 2, 1883. (Head-notes by the court.)

JACKSON, Chief Justice.

Navel et al. vs Grannis et al. — Patterson et al., road com'rs, vs. Hendrix et al.

NAVEL et al. vs. GRANNIS et al.

During the term when a case was tried, a motion for new trial was made and a brief of evidence was filed, but owing to a disagreement of counsel, the brief was not then approved. When the motion was called at that term, counsel for plaintiff not being present, it was continued by the court to the next term. When it was then called, a motion was made by defendant to dismiss it, because the brief of evidence had neither been agreed upon nor approved at the term when the motion was made. The motion to dismiss was overruled, and the brief perfected:

Held, that it was proper to overrule the motion to dismiss. It was in the discretion of the court to continue the motion for new trial, and at any time thereafter, before the hearing, it could be amended by perfecting the brief. 49 *Ga.*, 179; 54 *Id.*, 256; 44 *Id.*, 266; 56 *Id.*, 468.

(a.) The cases in 5 *Ga.*, 399; 8 *Id.*, 112; 9 *Id.*, 504, arose under the rule as it existed prior to the adoption of the Code. In the cases in 50 *Ga.*, 595; 52 *Id.*, 354, no brief at all was filed which was agreed upon or approved at the trial term, or any subsequent term of the court. The cases in 66 *Ga.*, 277, and 68 *Ga.*, 815, rested upon the argument of counsel, and it was held that time was of the essence of the contract.

Judgment affirmed.

October 23, 1883.

HALL, Justice.

PATTERSON et al., Road Commissioners, vs. HENDRIX et al.

1. Where a case was argued during the term of court, and a consent order was taken, allowing the presiding judge to decide the same in chambers within thirty days from the date of the order, time was of the essence of the consent, and a judgment rendered in chambers after the time allowed had expired was *coram non judice* and void, and on exception will be reversed. Code, §249; 60 *Ga.*, 123; 55 *Id.*, 258; 59 *Id.*, 628.
2. Two distinct persons having no privity of any sort between them, except that both had failed to obey a summons to do road duty, and had been tried therefor by the commissioners' court, cannot unite in one *certiorari* to the judgments against them.

Judgment reversed.

December 21, 1883

JACKSON, Chief Justice.

Lamar vs. The State of Georgia - Hazzard vs. The Mayor, etc., of Savannah ; etc.

LAMAR vs. THE STATE OF GEORGIA.

1. **There** was no ruling, charge or decision in this case exception to which was not properly abandoned in this court.
2. **The** verdict may not have been required, but was sustained by the evidence.
3. **This** court cannot consider any errors not plainly specified in the bill of exceptions. Code, §4251.
Judgment affirmed.
October 2, 1883.

HALL, Justice.

HAZZARD vs. THE MAYOR, ETC., OF SAVANNAH.

There was no abuse of discretion in granting a new trial on the ground that the verdict was not supported by the evidence, the case being quite a weak one on the evidence.
Judgment affirmed.

January 9, 1884.

JACKSON, Chief Justice.

GUNTER vs. MOONEY

A woman and another entered into a written agreement on July 15, 1862, whereby the other party was to take the son of the woman, feed and clothe him, and give him a common school education, and a horse, bridle and saddle when he became twenty-one years of age; the son became of age in December, 1874, and brought suit in 1880, alleging a breach of the covenant, in that the person so agreeing had failed to give him a common school education:

Add, that the plaintiff could not maintain an action of covenant on the agreement set out, he not being a party or privy to the same, but a mere stranger, and the case was properly dismissed on demurrer. 1 Chitty Pl., 20, 3 and cit.

(a.) Section 2747 of the Code does not militate against this view.
Judgment affirmed.

September 11, 1883.

MANFORD, Justice.

Goss vs. Lord.—The Savannah, Griffin and North Alabama Railroad vs. Holcombe.

Goss vs. Lord.

Where a *certiorari* was taken from the judgment of a justice, assigning errors of judgment as to facts, without appealing to a jury in a justice's court, it was properly dismissed, on motion. 69 Ga., 841; 70 Ga., 723; *Sav., Griffin & N. A. R. R. vs. Holcombe, post.*
Judgment affirmed.

November 6, 1883.

HALL, Justice.

THE SAVANNAH, GRIFFIN AND NORTH ALABAMA RAILROAD vs.
HOLCOMBE.

Where the issue in a justice's court is one of fact, appeal, not *certiorari*, is the remedy. 69 Ga., 841; *Goss vs. Lord, supra.*
Judgment affirmed.

November 6, 1883.

JACKSON, Chief Justice.

DYSON vs. THE STATE OF GEORGIA.

1. The evidence fully sustains the verdict.
 2. Jurors cannot impeach their finding by showing that the verdict was not fully, freely and unconditionally agreed to by them, and that it was made under a misapprehension as to the effect of a recommendation to mercy.
 3. The newly discovered evidence in this case is cumulative and impeaching in its character, and might have been procured at the trial by the use of proper diligence.
 4. A ground of a motion for new trial to the effect that the defendant was unintentionally prevented by accident from stating to the jury all that he desired or intended to state, is not sufficient, where it does not appear who prevented him from making such statement. In order to require a new trial, it should appear that this right was denied by the court.
- Judgment affirmed.

October 2, 1883.

BLANDFORD, Justice.

Sitton vs. Cureton et al.—Dale & Wells vs Daniels; Dale & Wells vs. Marmelstein.

SITTON vs. CURETON et al.

The question of overflowing lands by a mill-dam having been submitted to arbitration, an award that the owner of the dam pay to the owner of the land a specified sum annually "for each year he keeps his mill-dam up to a certain point indicated by the arbitrators on a certain stump," included the right of the dam owner to raise the water to the height indicated by the arbitrators.
(a.) The sole question being whether the water had been raised to a greater height than the award allowed, it should have been left to the jury.
Judgment reversed.
November 20, 1853.

BLANDFORD, Justice.

**DALE & WELLS vs. DANIELS; DALE & WELLS vs. MAR-
MELSTEIN.**

These cases are controlled by the ruling in *Thompson vs. Sprague, Sewell & Co.*, 69 Ga., 409.
Judgment affirmed.
January 8, 1864.

JACKSON, Chief Justice.

**THE SAVANNAH, FLORIDA AND WESTERN RAILWAY vs.
STEWART.**

Where suit was brought against a railroad for damages for killing an ox, and the only question was, whether the agents of the road, at the time of the casualty, were in the exercise of all ordinary and reasonable care and diligence, that issue was for the jury; and it having been fairly submitted, and there being conflicting accounts of the transaction, and the court below being satisfied with the finding, there was no abuse of discretion in refusing a new trial. 61 Ga., 11; 65 *Id.*, 714; 56 *Id.*, 540; 60 *Id.*, 182; Code, §3033.
Judgment affirmed.

September 18, 1863.

THOMAS, Justice.

West vs. The Atlanta and West Point Railroad.—Bryans vs. Mabry;

WEST vs. THE ATLANTA AND WEST POINT RAILROAD.

The first grant of a new trial, on the ground that the verdict contrary to the charge of the court, will not be disturbed, or verdict was demanded by the evidence, and the court below the legal discretion given him by law, in making such such was not the case here. 56 Ga., 398; 6 Id.. 31, 222; 120, 154, 594.

Judgment affirmed.

November 6, 1883.

BLANDFORD, Justice.

BRYANS vs. MABRY.

A notice that "I have applied for and had issued the writ of *certiorari* returned to the next term," etc., is not a sufficient compliance with the requirement of section 4059 of the Code that notice be given of the sanction of the writ of *certiorari*. 65 Ga., (a.) In 67 Ga., 515, the case was different. There the notice that the court had taken action upon the petition and had the writ.

Judgment affirmed.

November 6, 1883.

BLANDFORD, Justice.

MINOR *et al.* vs. DEVAUGHN.

[Hall, Justice, being disqualified, did not preside in this case.]

A court of equity has power to restrain one from increasing the height of his mill-dam, if such increase of height would be productive of loss of health in the family of another residing in the neighborhood of the mill; nor does it matter whether the mill is in town or the country. 18 Ga., 528.

Judgment affirmed.

October 2, 1883.

BLANDFORD, Justice.

Ison vs. Manley : Neal vs Henderson.

ISON vs. MANLEY.

The question presented by this record being whether, under facts on which testimony was had on a trial before the corporation court of the city of Griffin (from whose judgment a *certiorari* was taken), a certain encroachment on a sidewalk was a nuisance, the judgment of the court below will not be reversed because he remanded the case for a new trial, instead of rendering a final judgment therein.

(a.) It is not decided whether any encroachment on a sidewalk, which narrows it, so as to give ingress and egress to a basement or cellar, is *per se* a nuisance which the corporation must abate, on complaint by any private person; or whether it is in the discretion of the city authorities, on the facts in each case, in respect to the guard for securing the public safety, and the nature and extent of the interruption to the public convenience, or of the hurt or damage to the party or parties aggrieved. The record does not make this question squarely, and it is not passed upon it; but, as at present advised, this court inclines to the opinion that the question of abatement must turn on the fact whether the encroachment is a nuisance.

Judgment affirmed.

Nov mber 6, 1883.

JACKSON, Chief Justice.

NEAL vs. HENDERSON.

Where a person seeks to enjoin a judgment at law, the bill should set forth clearly and distinctly the grounds upon which the complainant's equity rests; and if it shows upon its face that the judgment at law was rendered by reason of his own negligence in not making the necessary defence, a court of equity will not grant relief by injunction. Code, §3129; 71 Ga., 523.

(a.) Where, after the foreclosure of a mortgage, the defendant filed an affidavit of illegality to the execution thereon, upon the ground that it had been paid, and the issue formed by such affidavit was passed upon by a jury, who found in favor of the plaintiff in *fi. fa.*, upon a bill then filed to enjoin the execution, an injunction should have been refused.*

Judgment reversed.

February 2 1884.

BLANDFORD, Justice.

*Compare *Brown et al. vs Boynton*, 69 Ga., 754.

Darby vs. The Wesleyan Female College; DeGraffenreid vs. The State of Georgia.

DARBY vs. THE WESLEYAN FEMALE COLLEGE.

1. After a bill of exceptions had been lodged with the clerk of the superior court, and by him marked "filed in office," it was withdrawn by one of the counsel for plaintiff in error, the outer paper was taken off and a new one put in its place, an acknowledgment of service was made by counsel for defendant in error, and the paper was re-filed. The clerk sent up both the original outer sheet and the bill of exceptions as re-filed. On a rule to show cause why counsel and the clerk should not be attached for contempt the answers showed that there was entire good faith, that the alteration was the result of a misunderstanding on the part of counsel and the clerk, the former not intending to have the paper marked filed when first handed to the latter, and that counsel for defendant in error were notified of what was done:

Held, that the rule will be discharged.

2. A clerk, having once received and filed a bill of exceptions, has no authority to alter it or allow it be altered by counsel for either or both parties. The bill of exceptions having been filed and an acknowledgment of service having been obtained thereon afterwards, it must be dismissed; and the taking off of the outer sheet and re-filing, being illegal, will not save the case from a dismissal. Writ of error dismissed.

October 23, 1883.

JACKSON, Chief Justice.

DEGRAFFENREID vs. THE STATE OF GEORGIA.

1. The conviction of the defendant in the mayor's court, under a municipal ordinance, for disturbing the peace, will not protect the accused from a subsequent prosecution by the state for assault and battery, though the same transaction be involved in both cases. 59 Ga., 168.
2. The charge was not erroneous; it neither expressed nor intimated an opinion on the facts, but stated hypothetically that if certain facts were proved, they would constitute assault and battery.
3. The verdict was right.
Judgment affirmed.

September 18, 1883.

JACKSON, Chief Justice.

TOOMER vs. Coleman : Fuller vs. The State of Georgia.

TOOMER vs. COLEMAN.

From a petition for *certiorari* it appeared that the plaintiff had done some work for the defendant in building a house, for the consideration of defendant's letting him have a cow; that defendant said plaintiff had not complied with his contract of building, and therefore refused compliance on his part by letting plaintiff have the cow. The cow was killed by a railroad. Defendant put in a claim for damages, and received \$16.00. The plaintiff stood by, said nothing and acquiesced in the payment. Subsequently, at the suggestion of a third person, he brought suit against the defendant for the money so received:

Held, that from this evidence it would seem that the title to the cow had not passed to the plaintiff; and if so, he could not recover the money received for her from the railroad. He might have sued for the value or contract price of the building, if he fulfilled his contract, or for the cow or her value, if she was the consideration.

(a.) If the title was in plaintiff, he might waive the conversion and sue for money had and received for his use, if the property had been turned into money. The judge of the superior court should have granted the writ of *certiorari*, that he might hear the case with the answer of the magistrate before him.

Judgment reversed.

September 18, 1883.

JACKSON, Chief Justice.

FULLER vs. THE STATE OF GEORGIA.

1. Under an indictment for using opprobrious words (Code, §4372), it is incumbent on the state to allege and prove that such words were used without provocation. Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation.

(a.) This differs from selling liquor without a license. There the license is held by the defendant and is peculiarly within his knowledge, and he cannot be required to criminate himself; but under the present charge, both parties have equal opportunities to prove the transaction as it occurred.

Judgment reversed.

September 11, 1883.

JACKSON, Chief Justice.

Grubb vs The State of Georgia; Pryor vs. Goldsmith Brothers. agents; etc.

GRUBB vs. THE STATE OF GEORGIA.

The evidence in this case showed the carrying of a pistol concealed to a place of amusement, the resistance of an officer who was proceeding to arrest a woman who was falsely claimed to be his wife by the defendant, and a shooting at the officer in pursuance of this resistance. and a verdict of assault with intent to murder was right. 1 Bish. Cr. L., 367 and cit.; 29 Ga., 470.
Judgment affirmed.

November 20, 1883.

JACKSON, Chief Justice.

PRYOR vs. GOLDSMITH BROTHERS, agents.

The record in this case discloses no error of law by the court, and the finding of the jury was demanded by the evidence. There was no error in refusing a new trial.

Judgment affirmed.

September 25, 1883.

BLANDFORD, Justice

HAMILTON vs. PRICE.

1. There was no abuse of discretion in granting a new trial in this case which will require a reversal. Code, §3717.
2. If one obtained the money of another and made a fortunate and profitable investment, and in consideration thereof promised to procure her a place, and in pursuance of this understanding, induced her to move and take possession of certain land, and she abandoned her former home in consequence of this agreement, made permanent and valuable improvements on the land, and parted with her money for that purpose, such a contract and part performance will give a right to relief in equity, by a decree for specific performance.
3. Where the judge of the superior court has granted a new trial, it will not be presumed that errors in charge made on the former trial will be repeated.

Judgment affirmed.

November 20, 1883.

HALL, Justice.

~~Womack vs. The State of Georgia; Warren vs. The State of Georgia; etc.~~

WOMACK vs. THE STATE OF GEORGIA.

1. The verdict is sustained by the evidence and in accordance with the law.
 2. The law of reasonable doubts was given in the regular charge, and it was surplusage to repeat it.
 3. There was no error in ruling that the sayings of the prosecutor, who was a witness, were admissible only for the purposes of impeachment by contradicting his sworn statements. The prosecutor is not a party, and stands before the court and jury as any other witness, to be impeached in the same way; and his statements outside and not under oath are admissible in the same way and for the same general purpose of contradicting him. They cannot be used in argument for another purpose. 7 Ga., 467.
- Judgment affirmed.

October 9, 1883. (He d-notes by the court).

JACKSON, Chief Justice.

WARREN vs. THE STATE OF GEORGIA.

Where the judge of the superior court refuses to sanction a petition for *certiorari*, and exception is taken thereto, the unsanctioned petition does not become a part of the record, but must be brought up in the bill of exception, or exhibited thereto, and properly identified by the signature of the presiding judge.

Writ of error dismissed.

October 26, 1883.

WOODWARD et al. vs. STILWELL.

The bill of exceptions must contain a brief of the oral and copy of the written evidence. Where a motion for new trial is made, the evidence may be brought up in the record and referred to in the bill of exceptions. But written evidence cannot be abbreviated and merely described in a bill of exceptions *ex parte*.

- (a.) The motion to dismiss was based on the ground that interrogatories were written evidence, and must be copied in full, and also, that the bill of exceptions stated that a note and written agreement between certain named parties was introduced in evidence, but did not set them out; but the ruling of the court was only that announced above.

Writ of error dismissed.

October 27, 1883.

Parmelee vs. The Savannah, Florida & Western Railway; etc.

PARMELEE vs. THE SAVANNAH, FLORIDA & WESTERN
RAILWAY.

The certificate of the presiding judge to the bill of exceptions stated that, "I do certify that the foregoing bill of exceptions, and contains all the evidence material," etc.:

Held, that this was fatally defective, in not stating that the bill of exceptions was true.

Writ of error dismissed.

September 18, 1883.

WATSON vs. MCCARTY.

A dissatisfied litigant in a justice's court presented his petition for *certiorari* to the judge of the superior court, who refused to sanction it, and the petitioner excepted. The bill of exceptions set out these facts, and following the certificate of the judge was what appeared to be the petition for *certiorari*, but it was not identified by the judge:

Held, that the writ of error must be dismissed.

October 10, 1883

FINNEY vs. HOOD *et al.*; THURMAN vs. CULVERHOUSE;
WALKER vs. BANKS, trustee

After a bill of exceptions has been filed in the office of the clerk of the superior court, an acknowledgment of service by defendant in error cannot be endorsed thereon; and the writ will be dismissed, although such entry purports to acknowledge "due and legal service."

Writ of error dismissed.

October 5, 11, 24, 1883.

LAMBERT vs. THE STATE OF GEORGIA; BROWN vs. THE STATE
OF GEORGIA; SMITH vs. THE STATE OF GEORGIA.

The verdict was supported by the evidence.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

FEBRUARY TERM, 1884.

PRESENT—JAMES JACKSON, CHIEF JUSTICE
SAMUEL HALL, ASSOCIATE "
M. H. BLANDFORD, " "

THE AUGUSTA FACTORY vs. BARNES.

1. An action by a father for the loss of services resulting from injury to his minor child, caused by the negligence of the agent at a factory where she was employed, is not a case for vindictive or exemplary damages, and a charge to that effect was error; but the amount found by the verdict did not exceed the actual loss proved, and the error in the charge, having done no injury, will not require a new trial.
2. The test to determine whether a plea amounts to a justification, so as to give the defendant the right to open and conclude, is whether such plea sets up facts which could not have gone in evidence under the general issue.
 - (a.) To an action by the father of a factory operative for an injury to his minor daughter, resulting from the negligence of the defendant's agents, a plea admitting that, on a day named, the daughter was employed by the company in its spinning room, and while so employed was injured, but denying that she was in the discharge and performance of her lawful duty, or that the company employed or continued to employ incompetent agents or officers, or that their acts were negligent, and asserting that, at the time of the injury, the girl was acting in violation of her instructions and outside of the scope of her employment, and that the injury resulted from her own negligence, was not a plea of justification.

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3. There was no error in refusing a non-suit in this case. Whenever a *prima facie* case is made out, questions of fact should be left to the jury.
4. In an action by a father against a factory company for injury to his minor daughter, the defendant having pleaded and proved that the daughter received her semi-weekly wages from it; that they were always paid to her and never to the father, and that the rent of the house which his family occupied was paid from this source; and it being argued from this that she had been emancipated from his control, and that he had relinquished all right to her earnings, it was admissible to show, in rebuttal of this, that she regularly accounted for and paid to him her wages.
5. A young girl received a terrible and painful injury while employed in a factory, and subsequently died from it; about half an hour after the injury, upon the return of her father to his home on receiving information of the accident, she stated to him that they put her to work on some new frames; that she refused to go, and the second hand cursed her and told her to go to work; that this frame was different from the old frame, and she did not want to run it; that they had to "duff" and stop the machinery to clean it off, and that the agent who directed the work at this frame started it without giving the usual signal. It was shown that she was injured while cleaning machinery, and that the person named as starting the machinery directed the work of the operatives at that particular frame and gave the signal prior to starting:

Held, that the statement was admissible as a part of the *res gestæ*.

- (a.) Where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by surrounding incidents.
- b.) The death of the person making the statements which form a part of the *res gestæ* is no ground for their exclusion from evidence. Section 3854 of the Code does not apply to such a case.
6. What one physician stated to another as to the cause of the disease of which the girl died was hearsay and inadmissible; nor did it appear that the physician was inaccessible or incompetent as a witness.
7. In case of the injury of an adult by the negligence of a co-employé, where the injured servant used all ordinary care and diligence to avoid the injury from the principal's other servants with whom he was disconnected at the time, and where he was acting in obedience to the orders of another servant over him, whose orders he was bound to obey, this court has held that he had a right to recover for the injury inflicted. Where the injured employé is a child of tender years, the master is bound to a higher degree of care.
- (a.) Although an infant employé in a factory may not have been in

the line of her duty at the time of an injury to her, yet if she was set to work on a particular frame, and what she did in cleaning the machinery was done under the direction of the superintendent of that work, and he did not forbid her engaging therein, he was bound to ordinary diligence in supervising her conduct, and if necessary to her protection, he not only might use coercion to restrain her from exposure and risk, but it was his duty to do so, and for neglecting his obligation in this respect his principal would be responsible.

(b.) The act of 1853 (Code, §§1885, 1886) does not lessen the obligation of the employer to look to the safety and protection of the minor operative, or interfere with the right of the parent to the earnings of his minor child, but affords another safeguard against the personal abuse of the minor by limiting the authority over him so far as it expresses, but no farther.

April 8, 1884.

Master and Servant. Parent and Child. Damages. Negligence. Principal and Agent. Non-suit. *Res gestæ*. Pleadings. Evidence. Before Judge RONEY. Richmond Superior Court. October Term, 1883.

C. G. Barnes brought suit against the Augusta Factory to recover damages for an injury to his minor daughter, which it was alleged resulted in her death.

The evidence for the plaintiff was, in brief, as follows:

Anna E. Barnes, the daughter of plaintiff, was fourteen years of age. She was employed by defendant. Cason was the second hand in the spinning room. This room was divided into sections, and Carter was in charge of one section. (At another part of the plaintiff's testimony, Carter is also called the second hand.) It was a part of his duty to give the signal for the frames to start. This is generally done by striking together two caps which are on the frame, or by striking the frame with a bobbin. There were three new frames in the room, which were in charge of two girls of the name of Sheehan. Anna Barnes was put at one of these frames to help in connection with it. When the machine was stopped for the purpose of taking off full bobbins and putting on empty ones (called "duffing"), she was engaged in cleaning some of the machinery. It was the duty of

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Carter to give the usual signal before starting the machinery, but he failed to do so, and the hand of Anna Barnes was caught in the gearing, and badly torn and lacerated, as to render the amputation of one finger necessary. She did very well for a few days, and was able to go to the factory, which was close by, and to the place near by where her father was at work. She soon, however, had symptoms of convulsions and of lock-jaw (*tetanus*), and died several weeks, after the injury from the effects of it. She only had measles a few days before her death. They had broken out and recovered before that time. The death resulted from lock-jaw, as just stated. Exposure with measles might complicate the case. She was carried home at once after the injury, and her father was sent for. On his arrival shortly afterwards, and while she was suffering from the wound, she made a statement as to how it occurred. (One or two of the witnesses speak of this statement as having been made "immediately after she was hurt." The father, who first detailed it, stated that he was sent for, and upon his arrival the statement was made to him. It was between eight and nine o'clock A. M. Another witness testified that the accident occurred about eight o'clock A. M.) This statement and the attendant circumstances were thus detailed by the father as a witness: "My daughter left my house about six o'clock in the morning, and I saw her again between eight and nine o'clock the same day. When I saw her, one of the fingers of her right hand was all cut up, and the other finger ripped up and a bruise on the top of the hand; a piece of the cog-wheel was in her hand, and she made this statement to me as soon as I saw her. She said at that time that they put her on some new frames, and that she refused to go on, and Mr. Cason, the second hand, cursed after her and told her to go to work; that this frame was different from the old frames, and she did not want to run it, but after he cursed her she went on anyhow; that they had to 'duff' and stopped the machinery, and she was cleaning off; and that Mr. Carter

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started it off without giving the signal." She also stated that it was a part of her duty to clean off the gearing while the "duffing" was being done. The cause of the injury was the failure of Carter to give the signal. It was his duty to go around and overlook the frames and see that work was done. At the time of the accident, Anna Barnes did not have any frame to take care of; she was helping another girl to clean her frame. Her father had never relinquished his parental right to receive her wages. She received the pay tickets from the factory and drew the money, but paid it to him.

There was other evidence as to the value of services.
etc.

The court refused a non-suit, on motion therefor.

Plaintiff further introduced testimony that, after the injury and shortly before the girl's death, she sent for Carter and had a conversation with him, in which he admitted that he started the frame without giving the signal, but said he did not think anybody was in the frame; that he did not see her, or he would not have done it for the world. She told him she forgave him. The injury was on March 31, and she died on April 26.

The evidence for the defendant was, in brief, as follows: Cason, the second hand in the spinning room, told Anna Barnes to cut and mend the threads; she was told to allow the other girls who were running the frames to clean them off, and they also were so instructed. She had no frame of her own, but was merely a helper, and her duty ceased when the frame stopped. There was more gearing on the new frames than on the old ones, but they were not more dangerous. Cason denied that she objected to going to work on the new frame, or that he cursed or used any bad language to her, or put her in a dangerous position, and stated that when she was hurt she was not in the discharge of the duty required of her. Carter was section hand and acting second hand. He had been in the factory for fourteen years and was a careful man. He had never been

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known by the witnesses to start a frame without giving the signal. Before the accident occurred, he looked on both sides of the frame and saw the girl who was in charge of it at her place; he gave the usual signal for starting, and after a few seconds the machine was started. A loud cry was heard; he at once stopped the frame, and found Anna Barnes underneath, with her hand caught in the gear. It was the duty of a girl in charge of a frame to clean it. If she were sick and another were put there, it would be her duty to clean it. Anna Barnes was paid by tickets issued in her own name, to be returned for settlement at the next pay day, with a deduction for the rent of the house occupied by the family. These were paid only on presentation, and she collected them herself. About eight days after the accident, she was in the factory grounds on a cold, drizzly day. She had a case of suppressed measles, which did not break out till her death. She was just reaching the age of puberty, and contracted a severe cold. Several members of the family had measles at the time of the accident. When she sent for Carter, he did not admit that he started the machinery without giving the signal, nor did she say that she forgave him, but that she did not blame him.

The jury found for the plaintiff \$1,000.00. Defendant moved for a new trial, which was refused, and defendant excepted.

The grounds of error are sufficiently stated in the divisions of the decision where they are discussed; and it is only necessary to state, in connection with the sixth division, that the fourth ground of the motion was as follows:

“Because the court, when Dr. Dessaussure Ford was a witness for plaintiff, and defendant proposed, on cross-examination, to show that, at the time of his examination of the deceased child, which disclosed that she had *tetanus*, from which, in the opinion of witness, she never would recover, and which, under his then opinion, would prove fatal, he was not allowed to state the information given

to him at the time coming from Dr. Wright, the physician attending the girl; that after her injury, she had been caught in the rain. The error alleged is that, being an expert and his opinion given as to the cause of death, the defendant was prevented from showing all the facts or statements upon which it was based or controverting the correctness of the opinion."

FRANK H. MILLER, for plaintiff in error.

H. D. D. TWIGGS; SALEM DUTCHER, for defendant

HALL, Justice.

This action was brought by the plaintiff to recover compensation for loss of the services of his minor daughter, who was so seriously injured while in the employment of defendant, by the carelessness, inattention and negligence of its agent, as to occasion her death. The trial resulted in a verdict of \$1,000 for the plaintiff, and a motion for a new trial was made on various grounds, and refused. The judgment refusing this new trial is here upon bill of exceptions and writ of error for review.

1. The judge instructed the jury that this was a case in which they might give exemplary or punitive damages, as a recompense for the wounded feelings of the plaintiff, and were we not well satisfied that in this finding they had allowed nothing on this account, this error in the law as charged would compel the grant of a new trial, for this is not an action in which vindictive or general damages can be given. Such only as are proved to have been sustained, such as are capable of exact computation, can be recovered. On the hearing in this court, this was conceded by the counsel for plaintiff. The amount found does not exceed the actual value of the loss proved, and as the error in the charge did not affect the verdict, it is not good ground for a new trial. 41 Ga., 675, 680. In the *Central Railroad vs. DeBray*, 71 Ga., 406, we held that, "as no

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special damages were found by the jury, and as the dict was such as to warrant the conclusion, that no damages entered into the same, the defendant was not by a charge on that subject."

2. Among others the defendant filed the following p

"It admits that on the 30th day of March, 1881, Anna Eliza Barnes (the plaintiff's minor daughter) was employed by it in spinning room, and while so employed was injured, but it avers at the time of such injury, she was not in the discharge and performance of her lawful duty and due service, but in the violation of instructions received from immediate superiors, and engaged in doing an act positively prohibited on her part, which act increased risk and caused her injury.

"That this defendant, denying that it has ever employed a competent servant, or continued one in charge with knowledge of incompetency, or that the officers in charge of the spinning room at the time of the injury of Anna Elizabeth Barnes, were then, or had been, incompetent or neglectful of their duties to her, he pleads that the actions of the servants, had upon the day and at the time of the injury of the said Anna Elizabeth Barnes, save except the individual act of the said Anna Elizabeth Barnes, which was outside of the scope of her employment and her duties, were justifiable, right and proper."

This was claimed to be in confession and avoidance, but it was insisted amounted to a special plea of justification which entitled the defendant to open and conclude his argument to the jury; the judge was of a different opinion, and refused this privilege to the defendant. The opinion is that he ruled correctly, and that the point is covered by the case of the *Ocean Steamship Co. vs. Williams*, 69 Ga., 251. There is no fact set up in this that might not have gone in evidence under the general issue, and according to that case, this is a decisive test to the character of the defence.

3. At the close of plaintiff's testimony, a motion was made to non-suit the case, which was refused. This ruling was clearly right, as will more fully appear when the questions upon which the recovery depends are to be considered. In *Cook vs. The Western & Atlantic Railroad Co.*, 69 Ga., 619, we laid down this rule upon the subject

non suits, viz.: that when there was not sufficient evidence to support a finding for the plaintiff, and when all the facts proved and all reasonable deductions therefrom would not support such a verdict, then the case should not be sent to the jury. But on the other hand, the court cannot be compelled to take the place of the jury and pass upon the facts, by granting a non-suit, because he would not be satisfied with a verdict in favor of the plaintiff. He may always remit questions of fact to them, and should not fail to do so whenever a *prima facie* case is made out.

4. The defendant pleaded and proved that the plaintiff's daughter received her semi-weekly wages from it; that they were paid to her always and never to him; that the rent of the house which his family occupied was paid from this source, and from this it was argued that she had been emancipated from his control, and that he had relinquished all right to her earnings. In reply to this defence, he offered evidence to show that she regularly accounted for and paid to him her wages. Conceding that the facts pleaded and proved would, if uncontradicted, justify the conclusion sought to be drawn from them, yet that conclusion could be rebutted by the evidence offered by the plaintiff in reply, which, as we conceive, was pertinent to that issue, and the court did not err in overruling defendant's objection to the same.

5. Testimony was offered and admitted, to the effect that a statement was made by plaintiff's daughter to him, on his return to his home, upon receiving information of her injury, where she had been carried from the factory directly after she had been wounded. It was shown that about a half hour had elapsed between the injury and the statement, and that no officer of the company was present when it was made. She said that they put her on some new frames; that she refused to go on, and Mr. Cason, the second hand, cursed her and told her to go to work; that this frame was different from the old frames, and she did not want to run it; but after he cursed her, she went on

any how; that they had to "duff" and they stopped the machinery to clean it off, and that Mr. Carter had started it off without giving the signal.

The injury was shown to have been inflicted while she was engaged in cleaning the machinery, and that Carter directed the work of the operatives at this particular frame, and was the person who gave the signal prior to starting it. This statement was objected to because it was not a part of the *res gestæ*, nor could it be considered in the light of dying declarations, but was merely the hearsay testimony of one then dead. It was not offered as dying declarations, but as a part of the *res gestæ*, and if admissible, it is conceded that it was only on that ground; that the statement was made at a different place from that at which the injury occurred, and after the lapse of some short time, if there were nothing else connected with it, would hardly afford a plausible ground for its rejection. but considering the circumstances, the terrible suffering the child was then and had been enduring from the frightful injury that had so recently occurred, we think a case was presented where a judge should have paused long before rejecting it; the propriety of the rejection would have been, to say the least, doubtful, and in cases where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by these incidents.

The common law, as well as the Code, §3773, makes declarations accompanying an act, or so nearly connected therewith, in time, as to be free from all suspicion of device or afterthought, admissible in evidence as part of the *res gestæ*. It is scarcely credible that this little girl, while enduring such excruciating pain, perhaps torture would not be too strong a word to characterize it, from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage of gain, or for any other ulterior purpose. Her mind must at that time have been wholly occupied with her own condition; this, it seems to

us, would be the reasonable and natural conclusion of any mind not warped by prejudice or biased by some strong motive leading or driving it in the opposite direction. Both the text-writers and the reports furnish numerous instances fully sustaining the ruling in this case. Among many others see 15 *Ga.*, 635; 11 *Id.*, 615; 47 *Id.*, 24, 41, 42, 68; 61 *Id.*, 192; 65 *Id.*, 94; 67 *Id.*, 636; *Mullery vs. Hamilton*, 71 *Ga.*, 720. There is a very full and satisfactory discussion of the subject in 8 Wall, 397; 1 Greenleaf's *Ev.*, §108, and following sections of that learned and valuable work.

It was suggested, rather than seriously urged, in the argument here, that the party making these declarations being dead, the same should be excluded, under the exceptions contained in the evidence act, Code, §3854, but we cannot bring our minds to the conclusion that there is anything in this point. The declarant, in this instance, can scarcely be deemed in a legal, nor, indeed, in any other sense, a party to the cause of action on trial, and this suit is certainly not prosecuted at the instance of an executor or administrator, or of one acting in any fiduciary right. It is the personal and individual suit of the plaintiff to recover for the loss of services due to him only, and for which he is not accountable to any other.

6. We do not think there was error in rejecting as testimony what another physician told Dr. Ford, as to the cause which produced the *tetanus* of which the girl died. This was certainly hearsay testimony, and it is not made to appear that the physician, who attended the deceased and imparted this information, was not accessible, and was not incompetent witness.

7. In case of the injury of an adult by the negligence of a co-employé, we have frequently passed upon the liability of the principal for damages, and fixed the limitations and conditions upon which a recovery might be had. In *The Central R. R. & Banking Co. vs. DeBray*, 71 *Ga.*, 406, we carefully examined our previous decisions, together

with the authorities in the text-writers, and the cases from the English courts and the courts of this country, and came to the conclusion that, where the plaintiff used all ordinary care and diligence to avoid the injury occasioned by the negligence of the principal's other servants, with whom he was disconnected at the time, and where he was acting in obedience to the orders of another servant over him, and whose orders he was bound to obey, that he had a right to recover for the injury inflicted under such circumstances.

This was substantially the instruction given by the court to the jury in the present case, and we think there was nothing in it to which the defendant could object; but are of opinion that, had the court gone farther, and held the defendant's agent in the case of this minor to a higher degree of care, there would have been nothing objectionable in his charge. The defendant owed a duty to this child, which required its agents in authority over her to look after her safety, while under its charge and engaged in the performance of her duties. Such was the ruling of this court, in the *Atlanta Cotton Factory Co. vs. Speer*, 69 Ga., 137, and we do not understand that there was anything in the opinion of Mr. Justice Crawford, who dissented from the majority, contravening this rule; so that to this extent the judgment may be considered unanimous. Even if this were not the case, the principle is firmly settled by the previous adjudications of this court, in which the party injured sustained to the employer a subordinate relation, like that of an infant employé. In *Scudder vs. Woodbridge*, 1 Kelly, 195, it was distinctly ruled that the doctrine that the principal is not liable to one agent or employé for damages occasioned by the negligence or misconduct of another agent or employé, is not applicable to slaves. The reasons given in that case for this exception, as set forth by Lumpkin, J., p. 199 of the opinion, strike us as entirely satisfactory. He says: "There is one view alone which would be conclusive with the court.

The restriction of this rule is indispensable to the welfare of the slave. In almost every occupation requiring combined effort, the employer necessarily entrusts it to a variety of agents. Many of these are destitute of principle and bankrupt in fortune. Once let it be promulgated that the owner of negroes hired to the numerous navigation, railroad, mining and manufacturing companies, which dot the whole country and are rapidly increasing; I repeat, that for any injury done to this species of property, let it be understood and settled that the employer is not liable, but that the owner must look for compensation to the co-servant who occasioned the mischief, and I hesitate not to affirm that the life of no hired slave would be safe. As it is, the guards thrown around this class of our population are sufficiently few and feeble. We are altogether disinclined to lessen their number or weaken their force. We are, therefore, cordially, confidently and unanimously agreed, and so adjudge," etc.

It is insisted, in this case, that the infant employé was not in the line of her duty, or in the performance of the work assigned her, when this injury befell her. Be this as it may, it is certain that she was set to work on that particular frame, and that what she did in cleaning the machinery was done under the eye of the superintendent of that work, and he did not forbid her engaging therein. This court has held that, as the agent of the company hiring her, he was bound to ordinary diligence in supervising her conduct, and if necessary to her protection, he might not only use coercion to restrain her from exposure and risk, but it was his duty to do so, and he would make his principal personally responsible by neglecting his obligation in this respect. 14 Ga., 137. This rule was laid down in relation to a hired slave. But has the legislature been less careful of the rights of parents and less mindful of the safety of these little factory operatives than it was of those of masters and slaves, while slavery existed? We think it is liable to no such reproach. In 1853, an act was passed regulating

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their labor in factories, prescribing the hours thereof, and declaring contracts in contravention of the act void, so far as relates to the enforcement thereof against such laborers. It was further enacted, that "no boss, or other superior in such establishments, shall inflict corporal punishment upon such minor laborers; and the owners of such factory or machine shop shall be directly liable for all such conduct on the part of their employés; and such minor may sue in his own name for damages for such conduct; and the recovery shall be his own property, and not belong to his parents." Code, §§1885, 1886.

This statute does not, as we apprehend, lessen the obligation of the employer to look to the safety and protection of the minor operative, or interfere with the rights of the parents to the earnings of his minor child, as was insisted by the very able and learned counsel for the defendant. It gives an additional right to the child, and affords another safe-guard against his personal abuse, by limiting the authority over him so far as it expresses, but no farther.

This disposes of every question made by this record at all material to be considered; and the result of our investigation is, that there was no ruling or charge by the court below of which the defendant has the least right to complain.

Judgment affirmed.

PUPKE, REID & PHELPS vs. MEADOR; SMITH & BONDURANT
vs. MEADOR.

1. Two distinct and separate cases arising from the service of garnishments by different plaintiffs on the same garnishee, could only be consolidated to the extent of trying them together, and then only by consent of parties; and the judgment having been adverse to the plaintiffs, it was proper for them to bring the cases to this court by separate writs of error.
2. When plaintiffs in judgment sued out summonses of garnishment, and, upon a traverse of an answer of not indebted made by the *garnishee*, showed that the defendants in the judgments were the

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owners of certain goods, notes and accounts from which the garnishee had realized a sum of money, which he had in hand when the garnishment was served, this made out a *prima facie* case for the recovery of such sum in the garnishee's hands, and the *onus* was cast upon the garnishee to show that the money was not subject to the garnishment, if he so claimed. That he stated that he held these assets by virtue of a writing which was in the hands of his attorney; and that the attorney stated that he had purposely left the writing at his office, and would not produce it if he had it, would not relieve the garnishment or authorize a dismissal thereof.

April 25, 1884.

Practice in Supreme Court. Practice in Superior Court.
Garnishment. *Onus Probandi*. Before Judge HAMMOND.
Fulton Superior Court. October Term, 1883

Reported in the decision.

C. H. & R. B. BARNES, for plaintiffs in error.

HOBBS SMITH, for defendant.

BLANDFORD, Justice.

1. A motion was made to dismiss the writs of error in these cases, upon the ground that they were consolidated by consent of the parties in the court below.

These are two separate and distinct actions by separate and distinct parties, and could only be consolidated to the extent of having them tried together, and then only upon consent of the parties. The judgment having been adverse to the plaintiffs, the plan adopted by them of bringing their cases before this court by two distinct writs of error was correct, and such was, in effect, the ruling of this court in 67 Ga., 339. So we think that the defendant in error can take nothing by his motion.

2. The plaintiffs in error obtained judgments against Roshing, Keller & Co., and sued out process of garnishment against Meador, who answered the same, denying indebtedness, or that he had in his hands any property,

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money or effects belonging to Rushing, Keller & Co. answer the plaintiffs traversed. Meador was sworn introduced as a witness by the plaintiffs, and he testified that Rushing, Keller & Co., being in the mercantile business in Atlanta, failed on the 28th of December, 1882, turned over their stock of goods, merchandise, book account, etc., to Meador; he sold the goods for \$4,340 and collected of the accounts \$2,784, by the 12th February, 1883, when he was garnished, and at that time had left in his hands \$2,955.99; that he paid nothing for these assets, but held them by virtue of some writing which he said was not in his control, but which was in the hands of his attorney. His counsel stated that he purposely left this writing at his office; that if he had the writing with him, he would not produce it. Thereupon the court dismissed said garnishment proceedings, and the plaintiffs in error severally excepted, and assign said ruling as error, and judgment as error, and file their separate bills of exceptions, and by distinct writs of error bring their cases here for review, and by consent they are considered together by this court. When the plaintiffs showed that Rushing, Keller & Co. were the owners of the goods, and the accounts from which Meador, the garnishee, had realized the money which he had in his hands when he was served with process of garnishment, then they had made out such a *prima facie* case as entitled them to recover the money, admitted to be in the hands of the garnishee when he was served with this process. It will be seen that the plaintiff showed not only possession of the goods in Rushing, Keller & Co., but he showed title in them also. The burden was then cast upon the garnishee to show, if he could, that this money thus in his hands was not subject to the garnishment of plaintiff. If he claimed that it was not so subject by reason of any writing or for any other cause, he should have made it appear to the court and jury. Other than the plaintiffs, under the proofs, would have been entitled to a verdict and judgment against him. 53 Ga., 470; 61

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300; 5 Humph. 446; 11 Ala., 155; Drake on Attachments.

Whenever the plaintiff makes out such a case as would entitle him to recover without more, then it is incumbent on the defendant, in order to defeat the plaintiff, to remove by proofs all inferences that may be drawn from plaintiff's proofs of his liability upon failure to do this. The plaintiff will be entitled to have judgment in his favor. The decision of the court below being contrary to these views, the judgment is reversed in both cases.

Judgment reversed.

DOSTER vs. THE CITY OF ATLANTA.

A municipal corporation is not responsible for a tort committed by one convict, sentenced to work on the public works under its municipal ordinances, upon the person of another, nor for a tort committed upon him by the guard over such convicts.

April 2, 1884.

Actions. Damages. Torts. Municipal Corporations. Before Judge HAMMOND. Fulton Superior Court. October Term, 1883.

Reported in the decision.

REED & WHITE, for plaintiff in error.

W. T. NEWMAN; E. A. ANGLIER, for defendant.

BLANDFORD, Justice.

Plaintiff in error brought his action against the defendant, wherein he alleged that he was arrested for drunkenness and fined by the municipal authorities. and when unable to pay the fine, he was sentenced to labor on public works; that when he was placed on such work, he followed convicts, in order to initiate him. stopped him.

Meissner vs. Stein.

the presence of the guards, with a strap belonging to one of the guards; wherefore he claimed to be damaged.

The sufficiency of the plaintiff's declaration was demurred to; the courts sustained the demurrer, and dismissed plaintiff's action, and this judgment is excepted to, and error assigned thereon.

The case of *Hammond vs. County of Richmond*, September term, 1883, is decisive of this case. The city of Atlanta is not liable for a tort committed by one convict upon the person of another; even in the case of a tort committed by the guard on the person of a convict, the city would not be liable.

Judgment affirmed.

MEISSNER vs. STEIN.

[This case was argued at the last term, and the decision reserved.]

1. Where a pilot brought into port a wrecked British vessel, which was libelled in admiralty, and was sold under decree of that court to which he was a party, and the vessel was thereafter refitted and her name and nationality changed, she was a new vessel, and the pilot was not entitled to pay, by reason of having tendered his services to carry her out of port, on the ground that he had brought in the wreck.
2. Pilots in ports and harbors are bound by their oaths to tender their services to vessels coming in or going out. If a pilot first tenders his services to an out-going vessel, and they are accepted, he is entitled to compensation; if not, he is entitled to none. If a pilot, cruising outside of the bar, tenders his service to an incoming ship (except coasters in the state, etc.), he is entitled to compensation, if his services are rejected; and should such services be accepted, it entitles him to pilot her out again, or to recover compensation therefor, except in cases of misbehavior, revocation of license, etc.

May 13, 1884.

Pilotage. Maritime Law. Rivers and Harbors. Ports. Before Judge ADAMS. McIntosh Superior Court. May Term, 1883.

Reported in the decision.

CHISHOLM & ERWIN; L. E. B. DELORME, for plaintiff in error.

LESTER & RAVENEL, by R. R. RICHARDS, for defendant.

HALL, Justice.

A pilot brought a wrecked British vessel into port, which was libelled in admiralty and sold under a decree of that court, to which he was a party, and, after being so sold, was refitted by the purchaser, and her name and nationality changed. He offered his services to carry her out to sea, which were declined. Thereupon he brought suit in a justice's court, held in McIntosh county, for the fees to which he claimed he was entitled for having offered to pilot her out, and had a judgment for the demand, which, on appeal to the superior court, was affirmed. He rests his claim upon two grounds:

(1.) That having brought the vessel in, he was entitled to carry her out, although her ownership had passed to another, and she had thereafter acquired a new name and nationality.

(2.) That if this claim was not well founded, by reason of the changes aforesaid, then, having tendered his services as a pilot to the outward-bound ship, which were refused, it and its owners, etc., became liable to him, under our law, for the fees which he would have earned, had his services been accepted.

1. We think he had no right of action on either ground; certainly not on the first, because the outward-bound vessel was not the same which he had picked up at sea and brought into port. He brought in the Termagant, a British vessel, which had been sold under the decree in admiralty, and thereafter rebuilt and stood out to sea as an American vessel. This was her first trip under her new name and nationality. She was completely transformed

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in both these respects, and was, to all legal intents and purposes, an entirely new vessel, as much so as she would have been had she been built out of entirely new material in her home port, from which she was sailing for the first time. When the Termagant was lawfully sold, under the decree in admiralty, the purchaser took an absolute title to her, divested of all pre-existing liens. The sale was for the benefit of all concerned, including lien holders. The liens were transferred to the proceeds of the ship, which, in the sense of the admiralty law, became the substitute for the ship. *The Amelia*, 6 Wallace, 18, 29, 30 ; 40 Ga. 178, 180 ; Cohen's Admiralty Law, pp. 199, 200, 201. This is putting the claim for pilotage upon the highest possible ground, for it is by no means certain that it rose to the dignity of a lien, or was anything more than a simple right against the master, owner or consignee of the vessel, under sections 1513 and 1514 of our Code. Be this, however, as it may, the entire claim for pilotage was passed upon in the court of admiralty, and whatever its character was, was paid out of the proceeds of the sale of the vessel and her cargo, and the plaintiff in this suit was thereby estopped from setting up any further demand, either for inward or outward pilotage. Benedict's Admiralty, §36 and citations.

2. While it is true that a pilot is bound by his oath "to repair on board of every vessel which he shall see and conceive to be bound for, coming in, or going out of the port or harbor." Code, §1506; yet, if this tender of service is made to and rejected by an outward-bound ship, no law, either maritime or statutory, or port regulation of which we are aware, gives him any right of action for damages or fees against the vessel, her master or owner etc. The pilot is entitled to no other fees or rights of action than those given by law, and whether a vessel, going out to sea for the first time, is compelled to take a pilot on board, if one offers his services, need not be decided. The question is, whether the pilot is entitled to reco-

compensation for services rendered. Because he has been favored in two special exceptions and permitted to collect for services tendered, this is no reason why the exception should be made the general rule." In *Thompson v. S. Sprague, Soule & Co.*, 69 Ga., 409, this court gave, as a reason for favoring pilots boarding vessels outside the bar and bringing them into port, that commercial necessities called for hardy, energetic and fearless pilots, and that was the policy of the state to encourage enterprise, and engender among them a laudable rivalry to venture beyond the bar, or its immediate proximity, that they might be ever ready to lend aid to vessels making for the port. The construction now insisted on, and which was adopted by our learned brother of the circuit court, would, as it seems to us, contravene this wise and prudent policy, and weaken the inducements held out by the law to pilots to venture out to sea.

We agree with the learned counsel who argued for the plaintiff in error, that a decision in favor of the claim of a pilot tendering his services to a vessel going out would be productive of unfortunate results, which would greatly impair, if it did not destroy, the efficiency of the system. Pilots would not have the same inducements to cruise outside the bar for the benefit of commerce, but would quietly remain in port, and content themselves by collecting outward pilotage from every vessel leaving the harbor. We cannot think the legislature contemplated that their pilotage laws would ever receive the construction now contended for; and to sanction it, we think, would not be construction in a legitimate sense, but judicial legislation, by which rights and conditions would be annexed to the law, never intended, and certainly never expressly or impliedly enacted by its authors. The law, as it stands, gives to pilots in ports and harbors the right to compensation for services actually rendered and accepted, but to those cruising outside of the bar it secures compensation for services tendered; and should the services thus tendered

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be accepted, it entitles them not only to inward, but outward, pilotage fees for the vessel accepting the tender made outside the bar. These favors are extended only to the daring and vigilant guide, who encounters and braves the dangers of the seas.

The plaintiff in the court below made no case that entitled him to recover, and the finding in his favor must be set aside, and a new trial awarded.

Judgment reversed.

HARDIN vs. McCORD, executor.

1. Under the act of 1868, an applicant for homestead and exemption, under the constitution of that year, was required to make a schedule of the personalty which he wished exempted, and the ordinary was required to issue an order to the county surveyor to set apart under oath lands of the applicant not exceeding \$2,000 in specie, and to survey and plat the same, and when he returned this plat under oath, if no objections were filed, the ordinary should approve the schedule of personalty and the return of the surveyor, which was then turned over to the clerk of the superior court for record; if objections were made by a creditor of the applicant, assessors were appointed, and from an approval of their return an appeal could be taken. There was no requirement of a petition, or that it should state that the applicant was the head of a family.
2. If this were otherwise, a homestead having been granted in 1868, an amendment of the application could be allowed by the ordinary in 1883, so as to state the residence of the applicant, and that he was the head of a family. Such an amendment having been allowed, the original homestead and exemption, with the amendment, were admissible in evidence.

March 18, 1884.

Homestead. Pleadings. Amendment. Before Judge STEWART. Rockdale Superior Court. August Term, 1883.

A *fi. fa.* in favor of McCord, executor, against Hardin, was levied on certain corn, etc., which Hardin claimed to be exempt as the proceeds of land which had been set apart to him as a homestead. On the trial, he offered in evidence the record of the setting apart of a homestead to him and an

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amendment thereto ; but they were rejected by the court. After verdict against him, he moved for a new trial, which was refused, and he excepted.

The original petition for homestead offered in evidence stated that the applicant was the owner of certain property ; that he desired to have a homestead therein ; and prayed that the county surveyor be directed to survey, set apart and value such homestead as by law required. Exemption of certain personalty was also asked. This petition was filed November 7, 1868. The county surveyor made his return, and the homestead and exemption were approved November 23, 1868. In March, 1883, the same petitioner asked to amend his former petition by inserting an allegation that he was a citizen of the county of the application and the head of a family, consisting of himself, his wife and three minor children. The ordinary caused a citation to be issued and published, and at the April term, 1883, passed an order allowing the amendment.

A. C. McCALLA ; JOHN I. HALL, for plaintiff in error.

J. N. GLENN, for defendant.

BLANDFORD, Justice.

John D Hardin, in 1868, applied to the ordinary of Newton county, under the constitution and act of 1868, for an exemption of personalty and the setting apart of a homestead of realty ; his application set forth the personalty in a schedule, also the realty, which he wished exempted and set apart as a homestead, but the application failed to state his residence, or that he was the head of a family, but it claimed the exemption and homestead under the constitution of 1868. In 1883 he applied to the ordinary of Newton county to correct his application, alleging that he was, in fact, when the application was made, a resident of Newton county and was the head of a family, consisting of a wife and three minor children, who were

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named, and prayed that the application be amended in these particulars. The ordinary allowed this amendment to be made to the application. Certain lands, which had been set apart as a homestead by the ordinary in 1868, were levied on by execution in favor of defendant in error and were claimed by Hardin, the plaintiff in error, for his wife and children. On the trial of the claim case, Hardin tendered in evidence the original homestead and exemption allowed him by the ordinary of Newton county and the amendment allowed in 1868. This was rejected by the court, and this constitutes the error alleged here.

Under the act of 1868, the applicant for homestead and exemption was required to make a schedule of the personalty which he wished exempted, and the ordinary was required to issue an order to the county surveyor to set apart under his oath, lands of the applicant, not exceeding two thousand dollars in specie in value, and to survey and plat the same, and when he returned this plat to the ordinary under his oath, if no objection was made by any creditor of the applicant, the ordinary was required to approve the schedule of personalty and the return of the surveyor, which was turned over to the clerk of the superior court, who was required to record the same. If objection was made by a creditor of the applicant, then the ordinary was required to appoint certain persons as assessors, who were required to value the property, and when they made their return, the ordinary was required to approve the same; either party had the right of appeal to the superior court. The act of 1868 did not require a petition, nor did it require the petitioner to state that he was the head of a family, but he was only required to make a schedule of the personalty which he desired exempted. But be this as it may, in this case the applicant did present a petition, in which he not only set forth the personalty which he desired exempted, but also the lands which he wished set apart as a homestead, and failed to state his residence and that he was the head of a family.

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If this petition was not sufficient, then we think that it was cured and rendered sufficient by the amendment allowed by the ordinary in 1883. It is insisted by defendant in error that the amendment could not have been allowed in 1883, and that the action of the ordinary in this respect was void. We do not think so. The ordinary had full power and jurisdiction over this matter. Whether the petition was sufficient or not without amendment, we are satisfied that the ordinary had the right to pass on the amendment, and when allowed by him, it was as good as if the matters contained in the amendment had been embraced in the original petition of plaintiff in error; and to this effect is the decision of this court in the case of *Wallace vs. Cason*, 42 Ga., 435, in which it is decided, "that the court has power at any time to amend its records." "Every court has power to amend its records to make them conformable to truth." "A court has power to amend its records to make them conform to the actual facts of the case." And further, it is there held that "the court may, in its discretion, receive and act upon any competent legal evidence." 43 New Hamp., 508. "The record is a question of fact, that has to be established, like any other facts, by pertinent evidence, and parol evidence is admissible in such inquiry." 25 Conn., 337. This case, together with the authorities cited, fully establishes the power and the right of the ordinary to have allowed the amendment to plaintiff's petition. So we think that the original homestead papers, together with the amendment of 1883, should have not been rejected as evidence by the court, and that his judgment must be reversed for these reasons.

Judgment reversed.

Pearce vs. Brower.

PEARCE vs. BROWER.

In an action for libel, where the plaintiff's declaration does not show that the publication was a privileged communication, whether it was so or not, under the facts proved, is a question for the jury; and although a communication charging that a constable had collected money and appropriated it to his own use may have been privileged, in an action therefor, the plaintiff was entitled to have it submitted to the jury, whether the same was published maliciously or not.

- (a.) Malice may be inferred from the character of the charge, and its existence may be rebutted by proof. In case of an unprivileged communication, want of malice goes in mitigation of damages; if the communication be privileged, absence of malice constitutes a bar to the recovery. This involves a submission to the jury.
- (b.) If one who wrote a communication, charging a constable with misappropriating money, was a road commissioner, and wrote such communication to the commissioners of roads and revenues of the county respecting his duties as such commissioner, it was privileged; and if it was written in good faith, without malice, and with no intent to injure the reputation of plaintiff, he could not recover; or if the statements in it were true, he could not recover; but if the privilege was used merely as a cloak for venting private malice, and not *bona fide* in promotion of the object for which the privilege is granted, then the plaintiff could recover.

March 21, 1881.

Libel. Malice. Practice in Superior Court. Non-suit. Before Judge BRANHAM. Floyd Superior Court. September Adjourned Term, 1883.

Reported in the decision.

WRIGHT, MEYERHARDT & WRIGHT, for plaintiff in error.

ALEXANDER & WRIGHT; C. N. FEATHERSTON, for defendant.

BLANDFORD, Justice,

Pearce brought his action for libel against Brower, in which it is alleged that the defendant wrote and published of plaintiff, that the plaintiff had collected money as a con-

stable, and appropriated it to his own use. Evidence was submitted by plaintiff tending to show that the statement was not true; it was also shown that Brower was a road commissioner, and that the communication was addressed to the clerk of the board of commissioners of roads and revenues of Floyd county. When the plaintiff had closed, the defendant moved to non-suit plaintiff, upon the ground that the communication complained of was privileged, and that plaintiff had failed to show malice. The court sustained the motion, and awarded a non-suit in said case. The plaintiff excepted, and this exception is complained of now as error.

The plaintiff in error insists that, although the communication may be privileged, he had the right to require that the alleged libel be submitted to the jury; that they were to determine, from it and other evidence submitted by plaintiff, whether the same was published maliciously or not, and in behalf of this position he cites a number of authorities. Waite's Actions and Defences, vol. 4, p. 304, §2, and cases there cited; 46 N. Y., 427; 24 Wend. 434; 48 N. H., 161; 2 Add. on Torts, 932, note k.; 2 Add. on Torts, p. 945, §1100.

In behalf of the defendant in error, it is insisted that, as the plaintiff's proofs submitted showed the communication made by defendant was privileged, and that it was published without malice, it was not only the right but the duty of the court to arrest the case and award a non-suit, as was done; and he cites a number of authorities to sustain this position. 1 C., M. & R., 192; 17 E. C. L., 185; 9 B. & C., 403; Bull. N. P., 8; 25 E. C. L., 508; 6 C. & P., 497; 70 E. C. L., 581; 10 C. B., 583; 71 E. C. L., 307; 1 Tenn., 110; *Lester vs. Thurman*, 51 Ga., 118.

The question has been ably and exhaustively argued by the counsel for the parties in this case, and while it is to be conceded that the English authorities sustain the views submitted by counsel for defendant in error, the American decisions are equally as conclusive of the view pre-

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sented by counsel for plaintiff in error. Whatever doubt we might have as to the true rule upon the question submitted by the parties, if we were left to decide upon the authorities presented, this doubt vanishes before our own statute, which itself affords a rule and a solution of this question, and which binds this court. Code, §2975. It is declared, "In all actions for printed or spoken defamation, malice is inferred from the character of the charge. The existence of malice may be rebutted by proof, which in all cases shall go in mitigation of damages, and in cases of privileged communications will be in bar of the recovery." The charge in this case is the misappropriation of money collected by plaintiff as a constable. Cannot malice be inferred from the character of this charge? Who is to infer it? Who is to pass upon the question whether this inference of malice has been rebutted by proofs? The only difference made by the statute between a communication not privileged and one that is privileged is that, in the former or unprivileged class, want of malice goes in mitigation of damages, while in the latter class of privileged communications, absence of malice constitutes a bar to the recovery. It is most manifest from this statute that these matters are to be submitted to and passed on by the jury, the court taking care to instruct them as to the law governing their finding. In this case, the plaintiff's declaration does not show that the publication was a privileged communication, and whether it be or not, upon the facts proved, is a question for the jury. If Brower was a road commissioner, and he wrote the communication to the commissioners of the county respecting his duties as such commissioner, then the communication is privileged, and the court should so instruct the jury; and if the same was written in good faith, without malice, and with no intent to injure the reputation of the plaintiff, then plaintiff cannot recover. And further, if the representations of the defendant concerning the plaintiff are true, he cannot recover. But if the privilege was used merely as a cloak for venting

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private malice, and not *bona fide* in promotion of the object for which the privilege is granted, then the plaintiff could recover. Code, §2981.

We feel constrained to reverse the judgment of court in granting and awarding the non-suit in this case. Judgment reversed.

HOPE *et al.* vs. THE MAYOR, ETC., OF GAINESVILLE

1. Where it appears from the whole of a legislative act that the purpose and object was to create a corporation to lay out and construct a railroad between certain points, any instrumentalities authorized by the act in aid of, to conduce to, and to assist the great purpose of the act, is not a different subject-matter; an act is not unconstitutional as containing more than one subject-matter or matter different from that expressed in the title. Therefore the inclusion in the act of 1872, to incorporate the Gainesville, Jefferson and Southern Railroad, and for other purposes thereto connected, of a provision that any corporate town or city or state interested in the construction of said road might subscribe to the capital stock of the company by an election to be held for that purpose, and that the subscription of the city of Gainesville to the Gainesville and Jefferson Railroad is legalized and confirmed as a subscription to the Gainesville, Jefferson and Southern Railroad Company, did not render it unconstitutional.
- (a.) The objection should be serious and the conflict between the statute and the constitution plain and unmistakable before the judiciary should disregard a legislative enactment upon the ground that it embraced more than one object, or if but one object, it was not sufficiently expressed in the title.
2. Where such an act was on its passage before the legislature at the same time with an amendment to the charter of the city of Gainesville, by which it was provided that the city council should have power to issue the bonds or notes, or both, of said city for the purpose of improving its streets and promoting its growth and advancement and educational facilities, and all the property of said city should be bound for their redemption, provided that the amount of said city should at no time exceed \$35,000, such acts do not conflict with each other. The amendment to the city charter limiting the debt of the city, had reference to a debt or debt incurred for improving the streets, etc., as mentioned therein, not to subscriptions to the corporate stock of this railroad.

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amendment to the city charter having been approved the day after the charter of the railroad, did not repeal or render illegal the provisions of the other act.

(c.) The act of February 22, 1873, removes all doubt by amending the act limiting the city's indebtedness and providing that no part thereof should be construed to affect in any manner the city's subscription to the stock of the railroad.

3. Equity seeks to do full and complete justice, and all parties interested in the subject-matter of a suit should be made parties thereto. The injunction could have been refused for want of proper parties, the holders of bonds, the payment of which it was sought to enjoin, not being parties

April 15, 1884.

Constitutional Law. Laws. Charters. Railroads. Municipal Corporations. Before Judge STEWART. Hall County. At Chambers. January 24, 1884.

Hope et al., filed their bill against the Mayor and Council of the city of Gainesville, alleging that they were citizens and tax-payers of that place; that on or about July 1, 1880, defendants issued city bonds to the amount of \$30,000.00, and on or about August 5, 1881, they issued other bonds to the amount of \$20,000.00; that all of these were issued to pay a subscription of the city of Gainesville to the stock of the Gainesville, Jefferson and Southern Railroad; that the bonds are held by persons unknown to complainants; that defendants are preparing to pay the first installment of interest on these bonds to the amount of \$1,750.00; and that the subscription to the stock was illegal and invalid, and the bonds void. The prayer was for injunction to prevent the defendants from paying the interest on the bonds, or from assessing a tax to pay the principal or interest on the bonds, and for subpoena and general relief. The legal principles pressed before the Supreme Court are stated in the decision.

Defendants answered; and on the hearing, upon the bill, answer and numerous affidavits *pro* and *con*, the chancellor refused the injunction, and complainants excepted.

Hope et al. vs. The Mayor, etc., of Gainesville.

GEO. N. & D. P. LESTER; W. F. FINDLEY, for plaintiffs in error.

HOPKINS & GLENN, for defendants.

BLANDFORD, Justice.

The question presented by this record is, whether the act to incorporate the Gainesville, Jefferson and Southern Railroad Company, and for other purposes therewith connected, approved August 23, 1872, is constitutional or not. The act provides for the incorporation of certain persons and such others as may be associated with them as a body corporate by the name of the Gainesville, Jefferson and Southern Railroad Company; that they may hold and convey real estate. The 5th section of the act provides that they may survey, lay out and construct a railroad from the city of Gainesville, in Hall county, by way of Jefferson, in the county of Jackson, to some point they may select on the Georgia Railroad or on the Athens Branch Road. And by the ninth section of this act it is further provided, that any corporate town or city of this state, interested in the construction of said road, may subscribe to the capital stock of said company, by an election to be held in said city or town, as provided by the constitution. And the subscription of the city of Gainesville to the Gainesville and Jefferson Railroad is legalized and confirmed as a subscription to the Gainesville, Jefferson and Southern Railroad Company.

Before the passage of this act, the people of Gainesville had, by a vote authorized by a resolution of the mayor and council, granted a subscription of thirty thousand dollars to the capital stock of the Gainesville and Jefferson Railroad; and after the passage of this act, the citizens of Gainesville, by an election held for that purpose, authorized the municipal authorities to increase the subscription of the city to the capital stock of said company to fifty thousand dollars. This subscription was made by the

authorities of Gainesville, and fifty thousand dollars of the bonds were issued by said city and turned over to said railroad company, and stock to the amount of fifty thousand dollars in said railroad company was issued to said city of Gainesville. These bonds were sold, and the proceeds applied to the construction of said road.

1. It is contended by the able and learned counsel for plaintiff in error, that the act of August 23, 1872, is unconstitutional and void, because it violates paragraph 5, section 4, article 3 of the constitution of 1868 of this state, which declares "that no law or ordinance shall pass which refers to more than one subject-matter and contains matter different from that expressed in the title thereof." And it is insisted that the case of the *Board of Education of Americus vs. Barlow et al.*, as reported in 49 Ga., 232, is in point, and decides this case. While we admit that there is much reason and force in this position of plaintiff in error, yet we think that the case relied on must be left to stand on its own peculiar merits, and is not to be extended beyond the plain and obvious facts of that case. It is, to say the least of it, of doubtful authority. And the same bench which made this decision afterwards modified it. 52 Ga., 627. See also *Howell vs. State*, 71 Ga., 224. Whether an act of the legislature contains matter different from that which is expressed in its title, or refers to more than one subject-matter, is not at all times easy of solution, and it is somewhat difficult to lay down any general rule by which this is to be determined. In the case of *Rader vs. Township of Union*, 39 N. J. L., 509, Chief Justice Beasley says of a similar provision in the constitution of New Jersey to the one here under consideration, that its purpose is plainly two-fold: "First, to ensure a separate consideration for every subject presented for legislative action. Second, to ensure a conspicuous declaration of such purpose. By the former of these requirements, every subject is made to stand on its own merits, unaffected by improper influ-

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ences' which might result from connecting it with other measures having no proper relation to it; and by the latter, a notice is provided, so that the public, or such part as may be interested, may receive a reasonable intimation of the matters under legislative consideration." The constitution only requires substantial unity in the statutory objects. See Cooley's Const. Lim., 146, n. 1.

The Supreme Court of the United States, 107 U. S. 1 by Harland, J., held this language: "It is not intended the constitution of New Jersey that the title to an act should embody a detailed statement, nor be an index abstract of its contents. The one general object, the creation of an independent municipality, being expressed in its title, the act in question properly embraced all the means or instrumentalities to be employed in the accomplishing the object."

We think these principles are sound, and that an act cannot be obnoxious to the objections urged against the act of 1872, when it appears from the whole act that the great purpose and object of the legislature was to create a corporation to lay out and construct a railroad between certain points, and to carry out this object and purpose certain means and instrumentalities were authorized by the act. Yet because the means are provided in the act by which this railroad is to be laid out and constructed and the object of the legislature effected, it is said it renders the act void, as containing more than one subject-matter. We do not think so. When it is plain by the act a certain thing is to be done, any instrumentality authorized by the act in aid of, to conduce to, to assist, the one great purpose of the act is not a different subject-matter, but is part of the main subject-matter; it is a part of the "substantial unity in the statutable object," and is not unconstitutional. The objections should be serious and the conflict between the statute and the constitution plain and unmistakable before the judiciary should disregard a legislative enactment, upon the ground it embraced more than one object,

or if but one object, it was not sufficiently expressed in the title.

2. It is further contended in behalf of the plaintiff in error, that the act amending the charter of the city of Gainesville, approved the 24th day of August, 1872, by its 6th section, limits the debt of the city to thirty-five thousand dollars, and that therefore the issuing of fifty thousand dollars of the bonds of the city to pay the city's subscription to the Gainesville, Jefferson and Southern Railroad was unauthorized by law and illegal.

The 6th section of the act provides that the mayor and council shall have power and authority to issue the bonds or notes, or both, of said city for the purpose of improving its streets and promoting its growth and advancement and educational facilities, and all the property of said city shall be bound for their redemption, provided that the debt of said city shall at no time exceed thirty-five thousand dollars.

This act was approved the day after the act incorporating the Gainesville, Jefferson and Southern Railroad was approved. These two acts were before the legislature at the same time, and it may be fairly inferred that they were not in any manner in conflict; that the act of the 24th of August, 1872, which limited the debt of the city to thirty-five thousand dollars, referred to a debt or debts to be incurred for improving the streets, etc., as mentioned in the sixth section of the act, and not to subscriptions to the capital stock of the Gainesville, Jefferson and Southern Railroad, as provided in the act approved the 23d of August, 1872.

But whatever doubt there might be as to this question, the same is resolved by the 18th section of an act to amend the several acts incorporating the city of Gainesville, and for other purposes, approved 22d February, 1873, which section, after re-enacting the 6th section of the act of 24th August, 1872, with the proviso that the debt of said city shall not exceed thirty-five thousand dollars, contains a

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further proviso, "that no parts of this act shall ever be construed to affect, in any manner whatever, the subscriptions of the city of Gainesville to the Gainesville, Jefferson and Southern Railroad Company, and to the Rome and Raleigh Railroad Company. Thus do all doubts cease. Whatever constitutional objections there might be to the act of the 23d August, 1872, and to the power to increase the debt of Gainesville over thirty-five thousand dollars under the act of August 24th, 1872, this last act of February, 1873, makes all things plain and easy; it gives clear legislative assent to the right and authority of the city of Gainesville to make subscriptions to the Gainesville, Jefferson and Southern Railroad.

3. Equity seeks to do full and complete justice, and for this purpose it is a fundamental rule of equity that all persons interested in the subject-matter of a suit shall be made parties thereto. Now, it strikes us that the holders of the bonds of the city of Gainesville, the payment of the interest upon which is sought to be enjoined by this proceeding, are interested in this suit. They are the creditors; their rights and interests are sought to be affected by this suit; they are necessary parties to this proceeding, and while we think that the injunction was properly refused upon the other points mentioned, yet we think that the injunction could have been well refused upon this last ground.

Judgment affirmed.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD vs.
MILES.

Where suit was brought in a justice's court for \$60.00 damages and \$20.00 attorneys' fees, and after judgment for the plaintiff for \$60.00, the defendant gave notice of an intention to appeal to the superior court, but before it had done so, the plaintiff entered an appeal to a jury in the justice's court; the subsequent entry of the appeal to the superior court did not serve to remove the case from

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the justice's court, or to divest the jurisdiction of that court, though within four days from the judgment.

BLANDFORD, J., dissenting.

April 25, 1884.

Appeal. Before Judge MERSHON. Applying Superior Court. October Term, 1883.

Reported in the decision.

V. E. McLENDON; GOODYEAR & KAY, for plaintiff in error.

G. J. HOLTON & SON, by HENRY B. TOMPKINS, for defendant.

BLANDFORD, Justice.

The plaintiff in error was sued for killing a calf, valued at sixty dollars, and twenty dollars for counsel fees, by defendant in error. The justice rendered judgment for the plaintiff for sixty dollars. The plaintiff in error gave notice that he would appeal the case to the superior court, and did, within the time allowed by law, enter an appeal to the superior court. The defendant in error, before the appeal of plaintiff in error was entered to the superior court, entered an appeal to a jury in the justice's court. The judge of the superior court, upon *certiorari*, held that the appeal to a jury in a justice's court had precedence, and this ruling is complained of.

For myself, I think that it makes no difference which appeal was entered in point of time first, when both appeals were entered within the time allowed by law; that the appeal to the superior court ousted the justice's court of all jurisdiction, and removed the whole case to the superior court. Code, §§3628, 3627. The superior courts of this state are vested with appellate jurisdiction in all cases provided by law. Const. of Ga., Article 6, par. 4, Code, §5142. To allow an appeal to a jury in a justice's

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court to take precedence of an appeal to the superior court, would be to deprive the latter court of this jurisdiction expressly provided by the constitution of this state.

When the law allows the right of appeal to two parties whose rights are antagonistic, at one and the same time and one enters an appeal to a jury in a justice's court, and the other enters an appeal to the superior court, I think an appeal to the latter court, it being a court of general jurisdiction, a court of record, should prevail; besides when an appeal is made from an inferior jurisdiction to superior, it is the means provided by law for the removal of the case from the inferior to the superior jurisdiction and when entered the case is no longer in the inferior judicatory. So that I think the superior court erred in refusing the writ of *certiorari*.

But my associates think that, as the appeal was entered to a jury in the justice's court before the appeal was entered by plaintiff in error to the superior court, although both appeals were entered in time, the case was not moved to the superior court, under the act of 1882, p. 4 but remained in the justice's court, and that the judgment of the court below should be affirmed.

Judgment affirmed.

SAUL vs. BUCK, HEFFLEBOWER & NEER.

1. If a witness is impeached, he is not to be believed, unless corroborated by other witnesses or circumstances in proof.
2. There being no evidence to show that certain creditors settled with their debtor upon information received by them from their own agent, but the evidence showing that such settlement was made on the basis of the representations of the debtor, a request based on the former hypothesis was properly refused.
3. The other grounds in this motion for new trial are controlled by the decision in *Woodruff vs. Saul*, 70 Ga., 271.
4. A composition with creditors, brought about by false and fraudulent statements of the debtor, is void.
5. Where a debtor proposed to pay fifty cents on the dollar of

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debtedness, and at the same time paid some of his creditors in full, and promised to pay to others seventy-five cents on the dollar, but kept that fact concealed from the creditors who accepted a settlement at fifty cents, such settlement was fraudulent and void, and did not bind the creditors.

April 25, 1884.

Debtor and Creditor. Witness. Impeachment. Charge of Court. Fraud. Before Judge CLARK. City Court of Atlanta. June Term, 1883.

Buck, Heflebower & Neer brought suit against Saul on account for goods sold. The main ground of defence was, that defendant had made a composition with his creditors, and had settled the claim of plaintiffs. Against this they insisted that the composition was fraudulent, and while purporting to be alike as to all creditors, certain creditors were given more than plaintiffs, and that it was therefore void. The evidence was conflicting. The jury found for plaintiffs. Defendant moved for a new trial, which was refused, and he excepted.

In connection with the second division of the decision, it may be stated that the defendant, at the time of the compromise, lived in Sweetwater, Tennessee, while plaintiffs lived in Baltimore, Maryland; that his store was burned; that plaintiffs had an agent on the ground who wrote and telegraphed to them several times on the subject; but defendant went in person to Baltimore, and effected the compromise; and that the evidence of plaintiffs was that they agreed to the settlement entirely on his representations and statements.

MYNATT & HOWELL; C. W. SMITH, for plaintiff in error.

REUBEN ARNOLD, for defendants.

BLANDFORD, Justice.

A verdict was rendered in favor of defendants in error against the plaintiff in error, and he moved the court for a

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new trial, on various grounds, which was overruled, this is excepted to. and error is assigned here on exception.

1. One of the grounds of error in the motion is, that court charged the jury that, if the plaintiff was impeached he was not to be believed, unless corroborated by other witnesses or circumstances in proof. Under the facts in this case, we think that the court would have been justified in going much further than this. The evidence showed that plaintiff in error was sworn, and he testified in his own favor, and the main facts testified to by him were contradicted by his sworn answer to a bill in equity filed and pending in one of the courts of Virginia; and when he was re-introduced, when he testified that he never read the answer; did not know that it was important. The defendants in error read his depositions taken in the Virginia case, in which he testified that the answer was dictated by his counsel, from a memorandum furnished by him, and that the answer was true and correct. The jury might well have been instructed to give no credit to a witness thus impeached.

2. The next ground of the motion insisted on here is that the court erred in not instructing the jury that, if the defendants in error made the settlement with the plaintiff in error from information received by them from their own agent, then the settlement was good.

The evidence showed that plaintiff in error made a composition with his creditors; that he represented the state of his affairs to defendants in error in the city of Baltimore, and obtained a settlement of fifty cents upon the dollar, he stating that this was all he could pay, and that he would have to borrow money to pay this, and that all other creditors were to be paid in like proportion, and yet at the same time, he had paid some of them in full, and elsewhere he agreed to pay seventy-five cents on the dollar, which was concealed from defendants in error. Defendant in error made this settlement with plaintiff in error and

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account of any information which they received from their agent, but on the statements made by the plaintiff in error as to his assets and liabilities. A short time after this settlement, the plaintiff in error swore, in answer to the bill filed in Virginia against him, that he was worth eleven thousand dollars, and that when he made the compromise with his creditors, he was worth nine thousand dollars. We think the court did right to refuse to charge the jury as insisted on by the plaintiff in error. There was no evidence to require this charge.

3. The other grounds in the motion for new trial are fully covered and controlled by the decision of this court in the case of *Woodruff vs. Saul*,* this same plaintiff in error.

4. The verdict of the jury in this case was demanded by the evidence; a composition brought about by false and fraudulent statements of the debtor is void, and cannot stand.

5. The proposition of a debtor to pay fifty cents on the dollar of his indebtedness, when, at the same time, he has paid some of his creditors in full, and promises to pay others seventy-five cents in the dollar, which is kept concealed from his other creditors, who accept a settlement at fifty cents on the dollar, is fraudulent, and such settlement is void, and will not bind the creditor.

The judgment of the court below is affirmed.

MORGAN vs. SPRING, sheriff.

1 On a rule against a sheriff, one ground being that the sheriff failed to levy on certain cattle as directed by the plaintiff, where his answer traversed answer set out that he had made search for the cattle in his county, and could not find any such therein, although there were some such cattle in a neighboring county beyond his jurisdiction; that having failed to find any property, as a last resort, he levied on certain land pointed out by the defendant, such answer discharged him from contempt on that ground.

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2. A sheriff cannot discharge himself from a rule against him for neglect of duty in levying on, but not selling, land pointed out by defendant in *fi. fa.*, by showing that he has accepted an affidavit of illegality based entirely upon his own neglect of duty.
- (a.) If the sheriff and the defendant colluded, and thereby hurt the plaintiff, the sheriff is responsible to the extent of that hurt. The facts may be ascertained by an amended answer and traverse, desired.

March 4, 1884.

Sheriffs. Negligence. Levy and Sale. Rule. Before Judge BOWER. Worth Superior Court. October Term, 1883.

Reported in the decision.

H. MORGAN, by W. E. SMITH, for plaintiff in error.

W. A. HARRIS; D. H. POPE, for defendant.

JACKSON, Chief Justice.

The question made by this record is, did the court err in discharging the rule against the sheriff?

The rule is based on two grounds, first, that the sheriff did not levy upon certain cattle, as directed by the plaintiff in error, and secondly, that he accepted an affidavit of illegality, and returned it to court after levying upon a tract of land pointed out by the defendant in execution.

1. In respect to the first ground, the answer of the sheriff, which was not traversed, alleges that he searched diligently for the cattle alluded to by the plaintiff, but could find none in the county of Worth; that there were some such cattle in the county of Colquitt, but beyond the jurisdiction of the sheriff of Worth, and they were therefore not levied on by him; and further, that he used every exertion to find other property, and being able to find none, he went to defendant and requested him to point out property, who pointed out the land in question.

It appears from the rule nisi, that the "sheriff was in-

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structed by plaintiff to levy on a stock of cattle belonging to the estate of S. G. Ford, deceased, in the hands of E. J. Ford, administrator, which said sheriff refused to do," but levied on a lot of land, "pointed out by the defendant." The answer of the sheriff is to the effect that he tried to find the cattle in the county, but could not, and tried to find other property, but could not, and as a last resort he levied on the land pointed out by the defendant. Taking this answer to be true, which the court should have done, it not being traversed, it will be seen that it swears off the alleged refusal to levy, and sets up the fact that no such cattle could be found in Worth county, and that he was diligent to find other property, but could not in that county. Of course he had no right to make a levy in Colquitt county. So there was no contempt, but diligence shown, and this ground of the rule is untenable.

2. But another ground is insisted upon, and that is, that the sheriff made himself liable because he did not sell the property pointed out, but received an affidavit of illegality grounded on his own default and wrong. If the sheriff has done this, it would look like collusion between the defendant in execution and himself, and he could not lawfully delay the plaintiff, with the process of the court in his hands, by any such wrongful act, without being in contempt of its process and authority, and without violating the obligations the law imposes on his high office.

The rule is clearly laid down in 51 *Ga.*, 610, and 57 *Id.*, 161, that he cannot thus trifle with the process of the court and receive an affidavit of illegality which his own wrongful official conduct enabled the defendant to interpose. So that the question is, does this affidavit of illegality rest solely on the sheriff's wrongful conduct?

That affidavit is in these words:

* * * "That a certain *fi. fa.* issued from the superior court of Worth county, Georgia, and levied on a lot of land, No. 23, in the 16th district of said county, of Henry Morgan vs. Elzy J. Ford, as appears in the advertisement for sale of said lot of land, is proceeding illegally

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on the following grounds: 1st. That the said Henry Morgan is not entitled, by judgment or otherwise, to an execution against deponent. 2d. That he is not entitled, by law or otherwise, to levy and sell the property of deponent as he has advertised the same. 3d. That he has an execution against deponent as administrator on estate of G. G. Ford, he has no right under the same to levy, advertise or sell the property of deponent, as he has advertised the same. 4th. That the sheriff making the levy, has failed to give deponent the writ to notice required by the 3595 [see §3643] section of the Code within five days from said levy. 5th. That if he has an execution against deponent, the sheriff has no right to levy and sell the property of the estate of G. G. Ford, deceased, under the same, as he has advertised."

The uncontradicted answer of the sheriff is, that the first advertisement was wrong in not setting out therein the name of plaintiff, but other plaintiffs, by a mistake of the printer, not his own fault at all, but that he caused another advertisement to be made, at his own expense. It will be seen, however, that the affidavit of illegality rests on the second advertisement, under which he should have sold but was arrested by the affidavit. Any error in that his answer does not explain, and if by reason of error of his own therein—by his own wrongful conduct—he put it in the power of defendant to stop the process of the court by affidavit of illegality, he becomes himself liable to rule under the decisions in the 51st and 57th *Ga., supra*. All the grounds of the affidavit rest on the advertisement, except the first and fourth, in express language in each, and as the preamble to the whole affidavit uses the language, "as appears in the advertisement for sale of said lot of land, is proceeding illegally," etc., it would seem that the first ground, which is "that the said Henry Morgan is not entitled, by judgment or otherwise, to an execution against deponent," also rests on that advertisement, deponent swearing individually, and not in his representative character. It would seem that the advertisement was against him individually, and he meant that Morgan had no judgment against him individually as the sheriff had advertised the sale.

The fourth ground, of want of notice by the sheriff,

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clearly sets up his own wrong, even if there was merit in it when defendant had pointed out the land himself, as the answer of the sheriff alleges. Section 3643 of the present Code.

Besides all this, the case from the papers looks much like collusion between the sheriff and defendant, and we think that the ends of justice demand a further and fuller investigation of it. Certainly the rule and answer and affidavit, without more, did not authorize a clean discharge of the sheriff from all liability thereunder. Let the court below read the affidavit, which is vague and uncertain, in the light of the advertisement alluded to therein. It cannot be the first advertisement, because the papers show that by the dates, and explain that as erroneous in setting out the wrong plaintiffs, whilst this illegality seems to attack it for some other reason not disclosed. If it should appear that the affidavit, when read in the light of the advertisement, which we cannot find in this record, rests alone on the errors and wrong of the sheriff, then he is liable, under 51 and 57 *Ga.*, for accepting this affidavit of illegality, under the rule for contempt, or if, by a traverse of his answer, plaintiff can make it appear that the sheriff and defendant colluded, and thereby hurt the plaintiff, the sheriff is responsible to the extent of that hurt. Let the truth be ascertained by amended answer, traverse thereof, if desired, and the rule decided under the principles of law above declared.

Judgment reversed.

MONTROSS vs. THE STATE OF GEORGIA.

1. The verdict in this case was not only supported, but was required, by the evidence.
2. A charge that the circulation of a newspaper other than a pictorial one was not prohibited under the law then being considered (sec. 4537 (b) of the Code), however much the failure to make such a publication penal was to be regretted, if erroneous, did not hurt the defendant.

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3. A charge submitting to the jury not only the reading matter, but also the illustrations in the newspapers given away, in order that they might determine their character, was correct and applicable to the case.
4. Where a defendant was indicted for giving away an indecent pictorial newspaper tending to debauch the public morals, with intent to circulate the same, when he sought in his statement to read to the jury an article in another newspaper, and to exhibit to them pictures publicly displayed elsewhere in the city where the trial occurred, which he claimed to be of a more indecent character, and as having a more direct tendency to debauch public morals than anything which appeared in the paper before the court, there was no error on the part of the court in interrupting the accused, and prohibiting him from so doing.
 - (a.) While considerable latitude has been allowed to a prisoner in making his statement, the privilege has never been carried so far as to allow the party to state wholly irrelevant matter, or such as would be violative of every principle and rule of evidence.
 - (b.) The record does not disclose what the pictures were which it was sought to exhibit, or what the articles were which it was sought to read, and this court cannot judge whether they were relevant or proper.
5. Every person is presumed to intend the natural and legal consequences of his conduct; and where the agent of a newspaper, knowing of the law of this state against circulating obscene literature, violated it for the express purpose of making a test case, or of vindicating the character of his paper, and to insure a prosecution, sought the chief of police, and gave him copies of the paper, he cannot complain that he succeeded in obtaining a prosecution, or that the court in its charge did him injustice as to the intent with which he committed the act, although the result of his experiment was different from that which he anticipated.
- (c.) The sentence imposed is not matter proper for a motion for new trial.

April 25, 1884.

Criminal Law. Charge of Court. Practice in Supreme Court. Practice in Superior Court. Statement of Prisoner. Presumptions. Sentence. Before Judge CLARK. City Court of Atlanta. September Term, 1883.

Montross was tried in the city court of Atlanta on an accusation charging him with giving away indecent pictorial *newspapers* calculated to debauch public morals, known

as the "National Police Gazette." [See Code, §4537 (b).]

It was admitted that defendant gave away two copies of this paper, one of them being given to the chief of police of the city of Atlanta; but he insisted that it was not indecent, and did not tend to debauch public morals. He was convicted, and sentenced to pay a fine of \$1,000.00 or work twelve months on the public works. He moved for a new trial, on the following grounds:

(1.) Because the verdict is contrary to evidence and the weight of evidence.

(2.) Because the court erred in not allowing defendant to make his statement in his own way, and to state everything which he deemed necessary in his defence. ["The court restricted defendant in his statement as follows: Defendant was stating to the jury his good faith in trying to establish the sale of his newspaper in Atlanta, and the want of intention on his part to violate the law. He said that the Police Gazette, the paper charged to be obscene and obnoxious to the statute of Georgia, was sold in every city in Georgia, without let or hinderance, save only the city of Atlanta. It had been decided to be not obscene by the United States postal authorities, after the most rigid examination, and it was sent through the mails to private subscribers all over the whole Union; that no statute of Georgia prohibited the sale of the Police Gazette by name, but that the statute was directed against obscene literature calculated to debauch public morals; that he honestly believed, as he had a right to believe, that his paper was a legitimate publication, and obnoxious to no statute of Georgia, either in its literature or in its illustrations. Defendant stated that there was nothing clandestine or hidden in his effort to establish the sale of his paper, but, on the contrary, he gave the paper to the chief of police of the city of Atlanta, and told him that he believed his paper to be a legitimate publication in all respects. Defendant went on to state that his conviction that his paper could not be obnoxious to the statute of Georgia, was confirmed by

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what he had read and seen in Atlanta. He stated that he had seen articles in the Atlanta Constitution, giving the date of the paper and names of the articles, that were much broader than anything that ever appeared in the Police Gazette; and when he proposed to read these articles as a part of his statement, the court refused to allow him to do so. He also stated that he had seen pictures in the windows for sale, on the most popular streets of Atlanta, that were infinitely worse than anything of that kind that could be found in the Police Gazette; and when he proposed to show these pictures to the jury, as a proof of his good faith in the legitimacy of his paper, and his want of intention to violate the law, the court refused to allow him to do so, or to allow counsel for defendant to use the newspapers and pictures (not as original evidence, but as matter of argument), and to show, by comparison with papers admitted to be legitimate publications, that the Police Gazette was in no sense obnoxious to the statute of Georgia.

(3.) Because the court charged as follows: "The law has no penalty for any paper, however indecent, which is unaccompanied with pictures. Its penalty applies wholly to pictorial newspapers; and, although it may be regretted that other newspapers may shock the public decency by the narration of events, yet they are not amenable to the law. Yet, in reference to such papers, you should consider this distinction. There is a distinction in stating a fact in a newspaper as news, however horrid it may be, and giving pictures for the purpose of inflaming the passions of the people, or debauching private and public morals. What you read in our daily newspapers that may be even so horrid, indecent and vulgar, is permissible, because they are current events of the day."

(4.) Because the court charged as follows: "It is for you to determine now if there is anything in the reading matter and in the pictures which you consider offensive to modesty and delicacy. Now, what is modesty? Modesty is said to be that which is womanly; and why womanly

Because the best type we have of modesty is a virtuous woman in our christian civilization, and you are authorized to look at it from that standpoint, and see whether the pictures are indecent in that sense."

(5.) Because the court charged as follows: "Now, gentlemen of the jury, you have the right to ascertain the extent, to take into consideration the circumstances with which this thing was done to whom it was the papers were delivered, and under what circumstances. If it was given to the chief of police of Atlanta, and you believe so given as to invite him to make a test case of it, with a view to seeing whether or not this was an indecent paper, and if he did it with that purpose, he would be guilty of the intent."

(6.) Because the court charged as follows: "But with respect to the statement: All of the statement that does not affect the issue—the material issue of guilt or innocence—is not to be considered by the jury; but it must be of such matters as affect the case at issue, before the jury can consider it so as to acquit the defendant upon it." [In this connection, the court had just charged as to the right of the jury to give the statement such weight as they thought proper, either to acquit of guilty intent or to raise a reasonable doubt.]

(7.) Because the fine imposed upon defendant was excessive, in view of the good faith on his part, and absence of all intention to violate the law

The motion was overruled, and defendant excepted.

C. D. HILL; H. C. GLENN, for plaintiff in error.

W. D. ELLIS, solicitor city court, for the state.

HALL, Justice.

The accused was tried in the city court of Atlanta, found guilty, and sentenced to pay a fine of one thousand dollars, or, in default thereof, to labor for one year on the public works, for giving away an indecent pictorial newspaper,

tending to debauch the public morals, with intent to circulate the same, known as the "National Police Gazette." He moved for a new trial, upon various grounds, which motion was overruled, and he excepted, and brought the case here by writ of error.

1. A glance at the pictures with which the papers set up in the record are illustrated, and a slight examination of the printed matter, will be sufficient to fix the character of this publication as indecent, with an unmistakable tendency to vitiate the public taste and to debauch the public morals. The giving away and circulation of these papers having been admitted by the accused, the jury was clearly justified in returning a verdict of guilty; indeed, if the jury regarded their duty to the state, this evidence left them no alternative—it required the finding. There is, therefore, nothing in the two first grounds of the motion, that the verdict is contrary to evidence, without evidence to support it, and decidedly and strongly against the weight of evidence.

2. Under section 4537 (b) of the Code, which the accused was found guilty of violating, a charge by the court to the effect that the circulation of a newspaper other than a pictorial one, however indecent, was not prohibited by this law, however much the failure to make such a publication penal was to be regretted, if erroneous, did not hurt him, and therefore afforded no ground of exception.

3. A charge submitting to the jury not only the reading matter, but the illustrations, in the newspapers given away in order that they might determine their character, was applicable to the case as made, and in accordance with the terms of the statute.

4. We are of opinion that the court did not err in interrupting the accused in making his statement to the jury, for the purpose of prohibiting him from reading to them an article from another newspaper, and also exhibiting to them pictures publicly displayed elsewhere, which he claimed to be of a more indecent character, and as hav

ing a more direct tendency to debauch public morals than anything that appeared in the paper prosecuted. As well might the keeper of a lewd and disorderly house, or the proprietor of a gaming house or tables, claim that he had not violated the law, when called upon to answer for his offence, because others indulged in these nefarious practices openly and with impunity and were not prosecuted for their offences against public order and decency.

Under the Code, §4637, the defendant in a criminal case has the right to make to the court and jury a statement, not under oath, to which the jury may give such weight as they may think proper, preferring it to the sworn testimony in the case, in the event they believe it to be true, and this court has in several instances given a wide scope to the subjects which the statement may embrace; but we apprehend that the privilege has never been carried so far as to allow the party to state wholly irrelevant matter, or such as would be violative of every principle and rule of evidence.

The cases of *Loyd vs. The State*, 45 Ga., 58, and *Coxwell vs. The State*, 66 Ib., 309, cited by the zealous and able counsel of the defendant as against this limitation of the privilege, in fact sustain it. In the first it is said that "where a prisoner makes a rambling statement, not pertinent to the issue, it is not error in the court to admonish him that he must confine his statement to matters bearing on the case;" and in the other, that "the prisoner may be restrained, but should be allowed to state such facts as would be admissible in evidence." To have suffered this defendant to roam through the wide field of vulgar, erotic literature and obscene pictorial illustrations, and to parade before the court and country nude pictures, designed to excite passion, and lascivious and wanton articles taken from the daily press, would not only have been an abuse of the law under which this right is claimed, but would have been pandering to and encouraging the very evil which the statute then being enforced was designed

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to suppress. No respectable magistrate could for a moment tolerate a spectacle so gross and outrageous.

The record in this case does not disclose what pictures those were which it was proposed to exhibit, or what were the articles the defendant attempted to read. We cannot therefore, judge whether they were relevant or proper. If such had been the fact, it should have been made to appear.

The court did right in prohibiting this trial from being made the medium for advertising to the public papers of the character which this defendant seems to have been interested in disseminating.

5. Every person is presumed to have intended the natural and legal consequences of his conduct, whether that conduct be *malum in se*, as we think this was, or *malum prohibitum*. There is no pretence that this defendant was unapprised of the law under which he is prosecuted. According to his own showing, he knew of its existence, and violated it for the express purpose, as he states, of making a test case. He was anxious to vindicate the character of this paper from the charges brought against it, and with that view, and that he might not fail in his object, and to insure a prosecution, he sought the chief of police and bestowed upon him copies of this paper. Surely he cannot complain now that he succeeded in accomplishing his design, or that the court in its charge did him injustice as to the intent with which he committed the act. That he was disappointed in the result, and that his experiment cost him more than he expected, are matters which it is not our province to review.

The sentence imposed is not such a thing as can be put into a motion for a new trial.

Judgment affirmed.

INMAN vs. THE STATE OF GEORGIA.

- T**he constitutional right of every person charged with an offence against the laws of this state to be furnished, on demand, with a copy of the accusation and a list of the witnesses "on whose testimony the charge against him is founded," entitles the accused to a copy of the indictment and a list of the witnesses who gave testimony before the grand jury; but when he has been furnished with such copy and list, on demand, another witness, whose name was not on the list, is not rendered incompetent to testify on the trial.
- 2.** Where in a criminal case eleven jurors had been procured out of the panel of forty-eight, and there remained but one to be procured and the court asked defendant's counsel if they were willing to take a panel of twelve jurors from those remaining on the list, and select from that panel the remaining juror, to which defendant's counsel replied that they were willing; this was a waiver of the array; especially as no demand for the array was made, no cause of challenge to the array was intimated, and no statement was made denying the waiving of the array.
- a.)** This case differs from 62 Ga., 731.
- It** is legitimate for counsel in argument to allude to what has transpired in the case from the time it was called through its entire progress, and the conduct of the party or his counsel in connection therewith is a proper subject for comment. Such matters are necessarily in the discretion of the court, and that discretion will not be controlled except in a case of flagrant abuse; it must appear that the accused has received some positive injury or been denied some material right.
- Where the state introduced in evidence the sworn statement of the accused before the coroner's jury, it was like all other testimony in the case; it was for the jury to consider, and its credit and weight were for them. They were not required to believe it unless contradicted by two witnesses or one witness and corroborating circumstances.
- That** the court charged as follows: "Has the state shown to your satisfaction that the accused is guilty of the crime with which he stands charged? Does this array of facts and circumstances in proof before you show beyond reasonable doubt—do they convince you, beyond all reasonable doubt, that he is guilty of the crime?" was not an expression of opinion by the court as to what had been proved, and does not require a new trial.
- 3.** In regard to the right of the jury to recommend imprisonment for life, the better practice is for the court to call the attention of the jury to the law and merely state to them that, if they think proper, *they may, in addition to the verdict of guilty, recommend that defendant be imprisoned in the penitentiary for life.* This was sub-

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stantially done in the present case, and the language of the charge was not such as was calculated to deprive, circumscribe or restrict the jury in respect to the exercise of their right of recommendation.

7. The verdict is supported by the evidence, and the presiding judge being satisfied with the finding, we will not interfere.

April 8, 1884.

Criminal Law. Practice in Superior Court. Juror Charge of Court. Evidence. Before Judge CARSWELL. Emanuel Superior Court. November Term, 1883.

To the report contained in the decision, it is only necessary to add the following:

Alfred Inman was indicted for the murder of his wife Mary J. Inman. It is unnecessary to set out the conflicting and voluminous evidence in detail. It is sufficient to state that the evidence on which the state relied for conviction was, in brief, as follows: In the forenoon of February 16, 1883, defendant rode up to the house of Bishop, and asked his assistance, stating that his mare had run away with his wife and thrown her, nearly killing her. He then rode back, and one or two persons followed him to the place where the corpse was. He preceded them slightly, and when they arrived, they found him bent over her, calling her by name. A conveyance was brought and the body placed in it and carried to the house. Defendant stated that a pine burr had fallen on the mare, which his wife was riding; that the mare had jumped and run away, and his wife had been thrown and dragged by her feet, which were hung in the stirrup leathers; that the pine line, which served as reins, had caught on a small stump and the mare had run round it kicking; that he had stopped her and freed his wife, who was not then dead, and he had laid her down and gone for assistance. Some of the parties who received this information looked at the ground the same day and only a short time after the death; a coroner's jury were empanelled and held a inquest on the next day, and the grounds and surroundings were thoroughly examined. The place where the body

found was in a patch of woods, about half way between the house of Inman and that of Bishop, and about half a mile from each. The body, when first seen by others than the husband, lay on its face, and under the head, in a slight indentation in the ground, was a little pool of blood; a few feet away, at the base of a tree, were found spots of blood, as though spattered there. The head of the deceased was some ten feet from the stump where the defendant said the reins caught, and her feet were towards it. The stump showed no signs of being rubbed by a rope or reins; there was loose bark on it, which one of those inspecting it took off by merely passing his hand over the surface. No horse tracks were found circling about the stump nor anywhere around it, except in the pathway which ran past, and which was three or four feet from it, and these appeared to have been made by a horse going at a slow gait, and not in a run. A few feet from the dead body was found a small lightwood knot, and a little farther off, a larger knot or a portion of a limb. On both of these there were blood and hair. The wounds on the corpse were on the upper portion of the head, where the skull was broken in. There were lesser wounds on the sides or front portion of the head, and on the hands, which were severely wounded. No scratch or bruise was found about the feet, legs or other portion of the body, nor was the clothing of the deceased torn or soiled, nor was it disarranged to any considerable extent when the first witnesses reached the scene of the death. A search was made for the place where the pine knots came from. The larger one had a moist side with dirt on it, and a hole or "bed" in the ground was found some feet away, into which it fitted exactly. There was also an old lightwood log near by, which had upon it an indentation, as though a knot had been recently taken from it. Into this the smaller knot was fitted, and it was found to correspond therewith. One of the knots was fitted into the wounds on the head of the deceased, and the indentations in the head corresponded with the protu-

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berances on the knot. A short time before this, the deceased had received several hundred dollars for some property. When the body was being prepared for burial, the pocket of her dress were found turned inside out. A gold necklace, which she habitually wore, was gone and could not be found. In preparing to buy a coffin, defendant told one of the witnesses to look about the house for money as he had none; this was done, but the sum which she had recently received was not found. On the coroner's inquest, defendant was made a witness, and admitted the presence of himself and wife alone at the time of her death. He stated that he could not account for the light wood knots, nor could he account for his wife's pocket being turned wrong-side outwards, unless she so turned them while hunting for her snuff, which he said she had been doing just before her death. Otherwise, he accounted for the death in the same general manner as that in which he stated it on the day previous. When the neighbor went to the place where it occurred, after the death of Mrs. Inman, a witness noticed certain small spots of blood on the clothes of defendant, but thought nothing of it at the time, as it was supposed that he had handled the body of his wife, and that it might in that way have got on him.

The evidence for the defendant went to show circumstances to confirm the position that the death was caused by the runaway horse.

The jury found the defendant guilty. He moved for a new trial, on the grounds set out in the decision, which was overruled, and he excepted.

J. S. HOOK; H. D. D. TWIGGS; HINES & ROGERS, for plaintiff in error.

C. ANDERSON, attorney general; R. L. GAMBLE, Jr., solicitor general, for the state.

BLANDFORD, Justice.

The plaintiff in error was indicted in the superior court of Emanuel county for the murder of his wife, Mary Inman ; he was tried and convicted. He made a motion for new trial on several grounds, which were overruled by the court, and to this ruling, refusing the new trial, the defendant excepted, and now here assigns as error the refusal by the court to grant the new trial prayed for.

(1.) The first error assigned is, "that defendant, before arraignment and before pleading to the indictment, demanded a copy of the indictment and a list of the witnesses on whose testimony the charge against him was founded. The solicitor general furnished defendant with a list of the witnesses and a copy of the indictment, when so demanded. Subsequently, and during the trial of the case, but before any witness was sworn, the court, over the objection of counsel for defendant, permitted the solicitor general to swear and examine as a witness for the state E.A. Nash, to make out the charge against the accused. The counsel for the state, before the examination of any witness for the prosecution, notified counsel for accused that he had two witnesses besides those on the list furnished defendant, who would be sworn for the state, and that Nash was one of them."

The court, in explanation of this ground, states that, on demand of defendant's counsel, they were furnished with a copy of the indictment and a list of the state's witnesses. Before any evidence had been introduced in the case, the defendant's counsel were furnished with the names of two additional witnesses for the state, one of whom, Col. Nash, was sworn.

(2.) After the first panel of forty-eight jurors had been exhausted, a second panel of twelve jurors was made up. This second panel was not put upon the defendant, he not waiving the array and the putting this panel upon him.

The court makes this explanation as to this ground: "A

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list of ninety jurors was called, and of these a panel of forty-eight were called and put upon defendant. There was no challenge to the array, and eleven jurors were chosen and sworn from this panel of forty-eight. The court asked counsel if they were willing to take a panel of twelve jurors from those remaining on the list, and to select from the panel the remaining juror. Defendant's counsel replied they were willing to do so. Whereupon twelve jurors were called; there was no challenge to the array, and they were sworn upon their *voire dire*, and from them the twelfth juror was chosen and sworn."

(3.) Counsel for defendant objected to the solicitor general stating, in conclusion, to the jury, that counsel for the defendant had "dilly dallied" with this case; that they had moved for a continuance at the last term of this court upon the absence of the witness, Mark Jenkins, and at this term counsel for defendant had moved for a continuance on the same ground; that the court had sent for the witness and had him brought into court, and yet counsel for defendant had not introduced this witness. Counsel for defendant objected to these statements, on the ground that there was no evidence of these facts, and that such comments were improper.

The court makes this explanation as to this ground. The solicitor general remarked that, when this case was called for trial during the present term of the court, defendant moved for a continuance on the ground of absence of a witness, Mark Jenkins, and when this witness was produced in court he did not have him sworn as a witness. The court held that state's counsel had the right to comment on the conduct of counsel and defendant during the present trial.

(4.) Because the court refused to give in charge to the jury the following request of counsel for defendant: "If you find from the evidence that the state has introduced in evidence the sworn testimony of defendant before the coroner's inquest, before the state can disprove his sw

statements before the inquest, it must be overcome by the testimony of two witnesses or by one witness and corroborating circumstances."

(5.) Because the court, after having charged as follows, on the request of defendant's counsel: "If the state has introduced in evidence the sworn statement of defendant before the coroner's inquest, and if you find from this testimony, if the defendant has given an account of the manner in which his wife was killed, then all he swore before the inquest is evidence before you in this case," added, "and you can give to it such credit as you think it entitled."

(6.) Because the court refused to charge, as requested, "That no amount or number of proved circumstances from which it may be inferred that defendant's sworn statement is false, will do to disprove or overcome it, but there must be at least one witness directly disproving the facts sworn to by him, and in addition circumstances corroborating this witness."

(7.) Because the court erred in the following charge to the jury: "Has the state shown to your satisfaction that the accused is guilty of the crime with which he stands charged? Does this array of facts and circumstances in proof before you show beyond all reasonable doubt,—do they convince you beyond all reasonable doubt that he is guilty of the crime?"

(8.) Because the court erred in the following charge: "If you find him guilty, and the case be one in which you think you are justified in doing so, the facts and circumstances justify you in doing so, you can say in your verdict that 'we recommend that he be imprisoned in the penitentiary for life;' and upon that recommendation, it would be my duty to inflict that punishment upon him."

(9.) Because the verdict is contrary to law, contrary to evidence, and without evidence to support it.

1. The first error assigned is, that the court allowed, over the objection of the defendant, the witness, Nash, to swear and testify in behalf of the state, because his

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name was not on the list of the names of witnesses furnished the accused on demand made by him; and insisted by the learned and distinguished counsel for defendant, the plaintiff in error, that, by the bill of rights embraced in the constitution of this state, Code, §4634, upon demand by the accused, the state must furnish a list of all the witnesses which are to be produced against the accused on the trial to make out the charge against him, as is required in cases of treason in England, that the bill of rights of this state above cited alters and amends §4634 of the Code in this respect. We do concur in this view. The bill of rights provides "every person charged with an offence against the law of this state shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded." The words, "on whose testimony the charge against him is founded," are equivalent to the words used in §4634 of the Code, "the witnesses who gave testimony before the grand jury." whose testimony is the charge against the accused four. Is it not founded on the testimony of those who gave testimony before the grand jury? The grand jury bring the charge, and it must be founded on something; this something must be the testimony of witnesses sworn and examined by them. Under §4634 of the Code, the accused was entitled to be furnished with a copy of the indictment and a list of the witnesses who gave testimony before the grand jury, before arraignment. But by the bill of rights the accused is only entitled to a copy of the accusation and a list of witnesses upon which the same is founded, upon demand. So we think the bill of rights modifies the Code, §4634, to this extent and no more, that the accused is to be furnished with a copy of the indictment and list of witnesses who gave testimony before the grand jury, upon demand. The accused had the full measure of his right in this respect, and there was no error in allowing the witness, Nash, to be sworn and testify in this case.

2. As to the second assignment of error, we are all of opinion, under the circumstances of this case, that when eleven jurors had been procured out of the panel of forty-eight, and there remained but one to be procured; when the court asked the defendant's counsel if they were willing to take a panel of twelve jurors from those remaining on the lists, and select from that panel the remaining juror, defendant's counsel replied that they were willing to do so. This was, we think, a waiver of the array, no intention or desire on the part of defendant having been intimated or signified on their part of a challenge to the array. They agreed to take the twelve men whose names were on the lists, and to select from these twelve the remaining juror. This was equivalent to waiving the array, particularly as they made no demand for the array to be put on the accused, and intimated no cause of challenge to the array, and did not state that they would not waive the array, or that they would not waive anything, as was done in the case of *Cochran vs. State*, 62 Ga., 731. If the accused had demanded that the array of twelve men should be put upon him, and if this had been refused, it would have been error. If, when the defendant's counsel was asked by the court if they would take the remaining twelve jurors on the lists and select therefrom the remaining juror, they had replied that they waived nothing, or would consent to nothing, then it would have been error not to put the array of twelve on the accused. The accused is not bound to waive or consent to anything not required by law, yet if he or his counsel, in open court, does waive a right of this sort, or enters into an agreement by which such right is waived, he will be bound thereby; and the action of the court, founded on such waiver or consent, will constitute no ground of error which will authorize this court to reverse it.

3. The third assignment of error refers to the remarks of the solicitor general in conclusion. The remark of the court under this ground is, that the remarks of the solicitor

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or general were in reference to the conduct of counsel for the accused when the case was called, in relation to the continuance of the case for the absence of a witness who had made his appearance, but who had not been sworn as a witness in the case. The court held that the conduct of the accused and his counsel during the continuance of the trial were the proper subjects of comment by the counsel engaged in the case. Counsel are allowed the largest liberty in the argument of cases before juries, and whether the argument be logical or illogical, or whether the inferences and deductions drawn by them are correct or not, this court will have no power to intervene. Facts not proved cannot be discussed, but illogical conclusions from facts proved may be insisted upon, and there is no remedy; but in this case we think it was legitimate for counsel to allude to what had transpired in the case from the time it was called through its whole proceeding, and the conduct of the party or his counsel in connection therewith was the proper subject of comment, and there was no error on the part of the court in allowing the comments of the solicitor general in this case.

The judges of the superior courts are charged with the administration of the laws in their respective jurisdictions; how and in what manner the proceedings of their courts shall be regulated and governed must, of necessity, rest largely in their discretion; the proper administration of the law demands this. And it would take a very flagrant violation of this discretion to authorize this court to interfere; it must be such a case as, under all the facts and circumstances, shows that the accused had received some positive injury or been denied some material right. Such did not appear to have taken place in this case.

4. The fourth, fifth and sixth assignments of error be considered together, as they relate to the same subject matter.

The state had introduced in evidence the sworn statements of the accused before the jury of inquest.

court instructed the jury that this statement was evidence before them, and the jury could give to it such credit as they thought it entitled to. Counsel for plaintiff in error insist that the jury should believe it, unless contradicted by two witnesses or one witness and corroborating circumstances.

The rule laid down by the court, we think, was the right one. This evidence was like all the other testimony in the case; it was for the jury to consider; its credit and weight were for their determination; and we know of no law which would authorize the view insisted on by counsel for plaintiff in error.

5. The seventh assignment of error is as to a certain expression of the court in his charge to the jury. The expression being, "Has the state shown to your satisfaction that the accused is guilty of the crime with which he stands charged? Does this array of facts and circumstances in proof before you show beyond all reasonable doubt,—do they convince you, beyond all reasonable doubt, that he is guilty of the crime?"

The plaintiff in error insists that this charge is an expression of opinion on the part of the court as to the facts proved, and that the animus of the charge is calculated to injure the cause of the defendant with the jury. We fail to see any expression by the court of any opinion as to what has or has not been proved in the case. The animus of the charge seems to be on the line of the law. We cannot lay down any form by which the judges of the superior courts must be guided and follow in their charges and instructions to the jury; each judge must be allowed to pursue and follow his own taste and inclination in such matters, and unless he violates some rule of law, this court cannot interfere therewith.

6. The eighth assignment of error complains that the court restricted the jury in the exercise of their right to recommend the defendant to be imprisoned in the penitentiary for life. The errors complained of are: "If you

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find him guilty, and the case be one you think you are justified in doing so—the facts and circumstances justify you in doing so—you can say in your verdict, ‘we recommend he be imprisoned in the penitentiary for life.’”

We do not think that the language used by the court was calculated to deprive, circumscribe or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from *Hill vs. State*, decided at the last term of the court. Yet, we think in cases like this, the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case.

7. The last assignment of error is, that the verdict is contrary to law and evidence, and whether this ground be true, depends upon the evidence in the case.

The record shows a state of facts which would warrant the jury in finding the verdict which they did. If they believed the witnesses for the state, then the verdict was authorized from the evidence. This was a matter for the jury. The court who tried the case was satisfied with the finding, and we are not authorized to interfere. Code, §3717.

Let the judgment of the court below be affirmed.

SMITH et ux. vs. EUBANKS & HILL.

1. While inartificially drawn, the declaration in this case was, in effect, an action on the case for damages consequent upon the breaking of the terms of a lease, and such action sounds in tort. The contract of lease is set out by way of inducement, and the breaches of duty thereunder are, first, in failing to put the property in such condition as to be tenantable for the purpose for which it was leased, and which the defendants had agreed to do; and, second,

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- in turning the plaintiffs out of possession before the lease had expired.
2. In such an action, a general statement on the part of one of the plaintiffs, while a witness on the stand, that he was damaged three thousand dollars, was inadmissible.
 - a.) But the court does not certify this ground of the motion before granting the rule nisi. The motion for new trial, the rule nisi thereon and qualifications thereof, are matters of record; and where the bill of exceptions and record differ in relation to matters properly of record, the latter will prevail.
 - b.) The witness could swear to his daily receipts and profits, to show the amount of his damage.
 - c.) Where counsel for defendants had drawn from one of the plaintiffs, as a witness on the stand, the names of a large number of his customers, and night was approaching, the fact that the judge jestingly remarked, as a reason for adjourning, that counsel seemed to be taking a census, and he would adjourn the case until next day, was immaterial, and could not reasonably mislead the jury or hurt the defendants. This is unlike 61 Ga., 359.
 - d.) It was legitimate to prove damage from want of water, which, according to plaintiffs' version of the contract of lease, defendants had agreed to supply, the purpose of the lease being for a wagon and stock yard.
 - e.) Failure to comply with the terms of the lease, and damage therefrom, are enough to set out in the declaration, without specifying every item.
 - f.) A husband having made the contract of lease individually, but having taken out a warrant to dispossess plaintiffs as agent for his wife, in an action for damages based on the failure to perform the duties imposed by the contract, and on the eviction under the warrant, the husband and wife were properly joined as joint tort-feasors, unless a plea of misjoinder had been entered and established by legal proof.
 - g.) There was no error in charging, "You will look to see if there are breaches of contract. Plaintiffs complain that it was broken in two ways: first, that defendants were to erect certain buildings, stalls, blacksmith shop, and supply plenty of water, and that this was not done. Did defendants fail in any one or more of these? Then there was a breach of contract, and to the extent of plaintiffs' damage, they would be entitled to recover."
 - h.) It was error to charge that, in estimating the damages resulting from an unlawful and wrongful eviction of a lessee prior to the expiration of his lease, the jury could consider profits made after the eviction, by parties subsequently occupying the premises, as a basis of calculation.
 - i.) Evidence of patronage after the eviction and of the number of

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wagons, cattle, etc., received in the yard thereafter, would be admissible to show that the railroads built through the surrounding territory had not materially lessened the wagoning and cattle and sheep driving which had previously existed, in rebuttal of proof to the contrary; but the probable profit of the evicted lessee could not be measured by the profits of their successors.

8. Where a warrant to dispossess certain persons as tenants holding over, was sued out, and a counter-affidavit and bond given, but subsequently, the defendants relinquished the possession under protest, no harshness or oppression of any sort having been resorted to, while the persons evicted might sue and recover legitimate damages flowing therefrom, if they were not, in fact, tenants holding over, still, it was error to submit to the jury the question of oppressiveness in the eviction.

(a.) The measure of damages in such a case would be what the lessees evicted could have cleared had the eviction not taken place, but they could not recover punitive or exemplary damage for oppression or harsh treatment, in the absence of any evidence thereof.

April 25, 1881.

Eubanks & Hill brought suit against David Smith and his wife, Jennie Smith. The body of the declaration was as follows :

"On the first day of July, 1879, plaintiffs leased from defendants for one year next ensuing the following property (describing it); and the rental to be paid for said property was two hundred and forty dollars, payable monthly. Defendants undertook and agreed to immediately put said premises in good, tenantable condition, to furnish a good business house for a grocery store, a separate room for a bar-room, a separate room for a bed-room, a good house for wagoners, good stalls sufficient to hold one hundred head of horses; to dig wells, to furnish an abundant supply of fresh, pure water for man and beast, to run a partition fence through said lot, making two lots thereof, one for wagons and one for stock; to supply all the doors with good locks, and to build on said lot a blacksmith shop for the use of plaintiffs, the said plaintiffs to have the exclusive possession, use and control of said lot, and all the improvements thereon, and to be erected thereon as aforesaid, for the rent and price aforesaid. Plaintiffs went into possession of said leased premises on said first day of July, 1879, and promptly paid the rental according to the agreement, and, although often requested so do, the defendants, not regarding their said promises and undertakings in this regard, but contriving to injure and wholly ruin plaintiffs, failed and refused to put and keep said premises in good tenantable condition, and to make said several improvements. Defendants did build the blacksmith shop upon said

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lot, but immediately, without the consent of plaintiffs, rented it to other parties, and received rent therefrom.

Plaintiffs further say that, on the 1st of December, 1879, defendants rented the whole of said premises to J. C. Hess, and on 1st of January, 1880, defendants took possession of said premises, and ousted plaintiffs therefrom, under protest and against the wishes of plaintiffs, and plaintiffs then and there gave defendants notice that plaintiffs would hold defendants liable for all damages, both for the non-compliance with the contract of lease, and for the ouster and all resulting damages to the damage of plaintiffs, twenty-five hundred dollars, etc.

To this declaration defendants demurred on two grounds:

(1.) Misjoinder, because the declaration was founded in both contract and tort.

(2.) Because no cause of action was plainly, fully and distinctly set forth. The demurrer was overruled.

It is unnecessary to detail the evidence, further than to state that plaintiffs' testimony indicated that the contract was made with D. Smith, and his real estate agent notified them subsequently that he had rented to another; but the warrant to dispossess them was made by Smith, as agent for his wife; that they filed a counter-affidavit, but subsequently yielded possession under protest. As to the making of the contract and the items of damage set out in the declaration, the evidence was conflicting.

The jury found for the plaintiffs \$1,000.00. Defendants moved for a new trial, on the following among other grounds:

(1.) Because the court refused to sustain the demurrer to plaintiffs' declaration on the two grounds above stated.

(2.) Because the court admitted the following evidence of Reuben Hill over objection of defendants: "I took in from thirty to seventy-five dollars per day, and my profits were at least ten dollars per day, and were increasing daily, before water gave out. . . . Have made fifteen dollars per day profit on the bar. . . . I was injured three thousand dollars by having no water and having to give up. . . . The water giving out injured my trade two-thirds or more." [As to this ground, the court certified as

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follows: "My recollection is, that the error complained in second ground as to Hill's testimony as to three thousand dollars was withdrawn from the consideration of jury, regarded on all sides as out of the case, the witness having stated it voluntarily; as I know, if objection was distinctly made, I would not have permitted such testimony to remain in the case; but precisely how it transpired, my memory does not serve me."]

(3.) Because the court erred in remarking aloud and in the presence of the jury, while defendants' counsel was questioning the plaintiff, Hill, who was then a witness being subjected to cross-examination, "Colonel Thomson seems to be taking the census," said remark being calculated to mislead the jury. [As to this ground the court certified as follows: "The remark I made complained of as error in third ground of motion happened in this way: The witness, Hill, had been on the stand a long time; it was nearly or quite night. I had not before adjourned until next day, because I wanted to complete Hill's examination before doing so. I found from the course of cross-examination, in requiring witness to name every one of his customers upon whom he predicated a loss, of whom there were so many being named, I would have to adjourn before completing the examination; and I said, in mere pleasantry that, as Colonel Thomson seemed to be taking the census, I would have to adjourn without completing the examination of witness, not supposing it would be considered in any light by counsel or jurors, which, if so, would deny to the court the poor privilege of a jest to relieve the dull monotony of a tedious case. The cross-examination was resumed next morning, and continued without abridgment until defendants' counsel was satisfied."]

(4.) Because the court overruled a motion of defendants' counsel to withdraw from the consideration of the jury, all evidence of damage to plaintiff's business from *want of water*. Said motion being made after the evidence

was all in, and upon two grounds: (1) That the declaration contained no averment that authorized the introduction of such evidence; (2) that the damages proved were too remote, and the manner of proving them inadmissible. [As to this ground, the court certified as follows: "In making the ruling complained of in fourth ground, I did not regard the evidence of the three thousand dollars' estimate of injury, made by the witness, Hill, as embraced in the evidence."]

(5.) Because the court charged as follows: "A point has been raised as to whether the contract was joint or several. The defendants are sued jointly as the persons making the contract; as they are sued jointly, there should be, in order to separate them, a plea in abatement. In the absence of such a plea, if defendants have not established to your satisfaction where the title is, then the action should proceed for what it is worth as against both. Titles to real estate pass by writing, and to properly establish title, a writing should be produced by the party claiming the title against apparent ownership, and acts in accordance therewith. If this rule has not been complied with, the action would proceed against both defendants."

(6.) Because the court charged as follows: "You will look to see if there are breaches of the contract. Plaintiffs complain that it was broken in two ways: First, that defendants were to erect certain buildings, stalls, blacksmith shop, and supply plenty of water; and that this was not done. Did defendants fail in any one or more of these? Then there was a breach of the contract, and to the extent of plaintiff's damage, they would be entitled to recover."

(7.) Because the court charged as follows: "Any evidence of damages traceable solely to this breach of contract, either from loss of business before by plaintiffs or profits afterwards by parties occupying the premises, may be considered by you, and made the basis of your calculation in finding damages, should you find any."

(8.) Because the court charged as follows: "If plaintiffs

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were ejected, and in that act defendants made a second breach, in finding nominal damages, you can consider the oppressiveness of defendants' action in this second breach if you believe there were two breaches, and there was oppressiveness in the second breach."

The motion was overruled, and defendants excepted.

CARDLER, THOMSON & CANDLER, for plaintiffs in error.

REUBEN ARFOLD; FRANK A. ARNOLD, for defendants.

JACKSON, Chief Justice.

The defendants in error sued the plaintiffs in error for damages flowing out of a contract for lease of certain premises, in not fixing the same in a tenantable condition for the purposes for which they were leased under the contract, and in ejecting the defendants in error therefrom wrongfully, before the lease expired. The trial resulted in a verdict for a thousand dollars, and plaintiffs in error, defendants below, excepted to the refusal of a new trial on the several grounds stated in the motion, and assign error here on the refusal of that motion on those grounds.

1. While the declaration is not as formally and lucidly drawn as it might have been, there was no error in overruling the motion to dismiss it.

In substance, it is an action on the case for damages consequent upon the breaking of the terms of the lease, and in effect sounds in tort. The contract is set out by way of indictment, and the breach of duty under the lease, first, in not fixing the property so as to be tenantable for the purpose for which it was leased, and which plaintiffs in error had agreed to do; and secondly, in turning out the defendants in error before the time had expired. There are not two counts in it, but one count with two main branches of damage for the wrong or tort in not performing the duty under the contract which the law imposed upon the plaintiffs in error. There is no misjoinder of

counts for tort and contract. This case is covered by the *City and Suburban Railroad Co. vs. Brauss*, 70 Ga., 368. The declaration sufficiently sets out the complaint of the defendants in error.

2. The sweeping statement on the stand by Hill, one of the plaintiffs below, that he was damaged three thousand dollars, was inadmissible, 58 Ga., 110; but before granting the rule nisi the court does not certify this ground of the motion. The motion for the new trial, the rule nisi thereon and qualifications thereof, are matters of record, and where the bill of exceptions and record differ in relation to matters of record properly, the record will prevail.

Nothing else seems objectionable in this ground of the motion. The witness had the right to swear as to his daily receipts and profits.

3. The counsel for defendants to the suit had drawn out from the witness, Hill, the plaintiff, the names of a large number of his customers, and the court remarked that he seemed to be taking a census, and he would adjourn the case to next day. Night was approaching, and the judge made the remark jestingly as a reason for adjourning. It is excepted to, because it may have misled the jury. How, is not set out in the motion. We think the remark wholly immaterial, and it could not reasonably mislead the jury or hurt the defendants. The point is wholly unlike that in 61 Ga., 359.

4. It was legitimate to prove damage from want of water, which, according to plaintiffs' version of the contract of lease, defendants had agreed to supply, and failed in digging wells according to contract, when the purpose of the lease, a wagon and stock-yard, is considered. Failure to comply with the terms and damage therefrom, are enough to set out in the declaration, without specifying every item. So there was no error in refusing to rule out all evidence of damage from lack of water. The damage flowed directly from the wrong in not furnishing water as,

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according to plaintiffs' version, defendants had agreed to do.

5. The two defendants, man and wife, were joined in the action. The husband had made the contract individually and yet took out the warrant to dispossess as agent for the wife. They were properly joined as joint tort-feasors unless a plea of misjoinder had been entered and established by legal proof. This, in substance, is the charge, and the defendants show in this record no hurt to be done by it.

6. There was no error in charging the jury, "You are to look to see if there are breaches of the contract. Plaintiffs complain that it was broken in two ways: First, defendants were to erect certain buildings, stalls, a blacksmith shop, and supply plenty of water; and that this was not done. Did defendants fail in any one or more of these things? Then there was a breach of contract, and to the extent of plaintiffs' damage, they would be entitled to recover. This was the very gist of the action, outside of damages from the eviction, and we cannot see error in putting this issue before the jury right there, and in the language used by the judge in giving the law on that issue.

7. On the subject of damage consequent on unlawful and wrongful eviction prior to the expiration of the lease, the court charged: "Any evidence of damages traceable to this breach of contract, either from loss of business before by plaintiffs, or profits afterwards by parties occupying the premises, may be considered by you and made a basis of your calculation in finding damages, should you find any."

We think that this charge is error. What other profits in possession made afterwards, is no basis for recovery by plaintiffs. The successors of plaintiffs may have been more popular, and thus have had more customers. They may have managed better, and made more money. They may have been men of better habits, more prudent, *more successful business men*, more accustomed to

sort of business, and in these and many other ways the business may have been more profitable with them than in the hands of plaintiffs. Therefore, to base plaintiffs' prospective profits on their success, would be far from a just rule by which to measure damages sustained by them by their eviction. True, evidence of future patronage, of the number of wagons, cattle, sheep, etc., received in the yard by the successors, would be admissible to show that the railroads permeating the North Georgia territory had not materially lessened the wagoning, and cattle and sheep-driving before their building and running, in rebuttal of proof to the contrary; but to make the profits of successors the measure of how much plaintiffs could have made if not evicted, and thus the measure of their damages, would not be in accordance with law or reason.

8. So, too, on the subject of eviction, the court charged: "If plaintiffs were ejected, and in that act defendants made a second breach, in finding nominal damages, you can consider the oppressiveness of defendants' action in this second breach, if you believe there were breaches, and there was oppressiveness in the second breach." We think that this charge, too, is erroneous, and was apt to mislead the jury. There is no evidence of oppression or oppressiveness in this record in the proceeding to dispossess the plaintiffs. It was simply the ordinary process legally authorized to eject a tenant holding over. A counter-affidavit was put in and bond given by plaintiffs; no harshness of any sort was resorted to; it was simply a test of the question, according to law, whether the plaintiffs were tenants holding over or not. The plaintiffs declined the contest, and thus that proceeding was ended by their relinquishing possession under protest, according to their own evidence. That did not deprive them, it is true, of recovering their legitimate damages flowing from the breach of contract when evicted, and by reason of the eviction, if they gave up under protest. Those damages were what they lost by being evicted, to be measured by what they could have cleared,

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THE WESTERN & ATLANTIC RAILROAD vs. TURNER

[Jackson, Chief Justice, being disqualified, Judge Branham, of the Court, was appointed to preside in his stead.]

1. Railroad companies are liable for torts committed by their agents in the prosecution and within the scope of their business, whether the same be by negligence or voluntary.
- (a.) Where one was lawfully in the cab of a freight train of a railroad company, and was being treated for passage, as had frequently been done, and was injured by the conductor, as to an injury inflicted upon him by the conductor, he was entitled to recover damages within the reason and spirit of the authorities in reference to injuries done to passengers.
2. Conductors of through freight trains may, if required by the company or the exigencies of the case, refuse to carry passengers in their cabs or on their trains. But such refusal must be made known in a civil and respectful manner to a person seeking for passage thereon, and reasonable opportunity should be allowed for such person to quit the cab of his own motion. If he should refuse to do so, the conductor could use such force as was necessary to eject him therefrom. The conductor's acts in relation to these matters, under the facts of this case, were done in the prosecution and within the scope of his business for his use of insulting and obscene language in refusing to the applicant, and his violence in striking and injuring the applicant, the company was liable, even though it was voluntary.
- (a.) Section 2203 of the Code must be construed with section 2204 as to harmonize the two and allow both to remain of force in cases to which they apply.
3. Where there is no evidence of aggravating circumstances, act or intention, or of gross negligence, §3066 of the Code should not be given in charge, and the *onus* is on the plaintiff to show aggravating circumstances, in order to entitle him to have the section given in charge. But where there was proof of brutal and human conduct on the part of the agent of a railroad company, of his employment by the company several days after the commission of the act, that section was properly given in charge.
- (a.) The prompt discharge of such an agent by the company, and the fact of being advised of his conduct, and the repudiation of his act, exclude altogether the right of the plaintiff to recover damages.

126, 244; 4 Pet., 349; 16 How., 610, 58 Ga., 208; 12 Abb. Pr. (N. S.), 172; 1422 423

This question has recently been considered, and the authorities fully reviewed by the Supreme Court of Indiana, in an unpublished case, which cannot be given by name, as it is not before the reporter. (Rep.)

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damages "to deter the wrong doer from repeating the trespass," but would not prevent the jury from giving additional damages "as compensation for the wounded feeling of the plaintiff."

April 23, 1884.

Railroads. Damages. Negligence. Master and Servant. Before Judge FAIN. Whitfield Superior Court. October Term, 1883.

Reported in the decision.

R. J. McCAMY, for plaintiff in error.

S. P. MADDOX; T. R. JONES; W. K. MOORE, for defendant.

BRANHAM, Judge.

The plaintiff being in Dalton, and desiring to return to his home in Tilton, nine miles south of Dalton, and there being no passenger train there at the time, entered a cab, having the usual passenger accommodations, attached to a through freight train, then standing near the depot, for the purpose of treating with the conductor for passage to Beardsley's, a water station one mile above Tilton, at which point, he was informed by the engineer, the train would stop that night. Other persons often went down "on this schedule," and got off at this point. He had thirty cents to pay his fare. The fare, without a ticket, to Tilton, when paid on the train, was forty cents. The conductor, in reply to a polite inquiry of the plaintiff, said he was a little behind time, and that he did not expect to stop at Tilton, and that "he did not intend to be bothered with any d—d man that night." The plaintiff said he did not intend to bother him; that he had been unable to get a ticket; that he had money to pay his fare, and came in to see whether he would carry him or not; that the engineer told him he would stop at Beardsley's, and he could walk from there to Tilton. The conductor then said, "he did

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the head, in his face and mouth, and knock him out of his cab door with his lantern.

The Code, §2203, must be construed with section 2961, and so construed as to harmonize the two and allow both to remain of force, in the cases to which they apply.

3. The court gave in charge Code, §3066, and explained its application to the case. This is assigned as error, upon the ground that this is not a case for punitive damages. We think there was no error in this part of the charge. Where there is no evidence of aggravating circumstances in the act or intention, or of gross negligence, this section of the Code ought not to be given in charge. *Augustine vs. Factory vs. Barnes*, this term, also, *Smith vs. Overby*, 30 Ga., 241. It would have been error to have refused it in this case. This conductor's conduct was highly censurable. He was in the employ of the company several days after the occurrence, and there is no evidence in the record that he has ever been discharged. The onus is on the plaintiff to prove aggravating circumstances, in order to entitle him to have this section given in charge. 23 Ga., 145; *Savannah, Fla. & W. R. R. Co. vs. Stewart*, 71 Ga., 427.

It was done in this case by proof of brutal and inhuman conduct on the part of the agent, and by proof of his employment by the company several days after the transaction. The prompt discharge of such an agent by the company, upon being advised of his conduct, and the repudiation of his act, would exclude altogether, in such cases as this, the right of the plaintiff to recover additional damages, as provided by the section, "to deter the wrong doer from repeating the trespass;" but it would not prevent the jury from giving additional damages, "as compensation for the wounded feelings of the plaintiff." See 51 Ga., 646; 59 Id., 426; 60 Id., 492, and 58 Id., 216 (4).

In all cases, such damages must be regulated by the enlightened conscience of an impartial jury. They must be just, and they must not be inadequate or excessive.

The case of *Fay vs. Parker*, 53 N. H., 342, reported in

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∴ Repts., is an able, exhaustive and interesting his subject, adverse, however, to the allowance of any or punitive damages, but embracing within its images for wounded feelings, and every element of compensatory in its nature. The conflicting ties therein cited are fortunately put at rest by the provisions of our Code.

the judgment of the court below be affirmed.

JOHNSON et al. vs. DOOLY et al.

Actual notice is such as has been proved to have been given to a party directly and personally, or such as he is presumed to have received personally, because the evidence within his knowledge is sufficient to put him upon inquiry; and actual notice may be proved by the facts of the case from which it can be inferred.

The fraud which avoids a sale may be legal as well as moral. It may exist from misrepresentations made by either party, with design to deceive, or which actually deceive the other party, however innocently made; and such misrepresentations may be by acts as well as words.

) The court upon whose judgment an execution issues has full power to set aside a sale thereunder, whenever the ends of justice and fair dealing require it, and to order a resale, or award execution anew at discretion. This is an equitable power, inherent both in courts of law and of equity, and is invoked to remedy fraud or irregularity in the conduct of such sales, as between purchasers and the original parties to the suit.

The verdict is supported by the evidence.

April 8, 1884.

Notice. Levy and Sale. Attorney and Client. Fraud. Sales. Before Judge FAIR. Whitfield Superior Court. October Term, 1883.

Reported in the decision.

W. K. MOORE; W. C. GLENN; R. J. McCARTY, for plaintiffs in error.

Johnson et al. vs. Dooly et al.

WM. PHILLIPS; T. R. JONES; GEO. F. G. WOOD
POWER, for defendants.

HALL, Justice.

This bill in equity was brought to set aside a conveyance of land sold at sheriff's sale. Among the allegations alleged for asking that this sale be set aside, and the parties interested be reinstated to their respective rights they existed at the time the sale was made, are that the same was not advertised for four weeks or twenty days, as required by law; that the purchaser at the sale who also controlled the *fi. fa.* under which it was sustained certain confidential relations to the complainant of which he might have taken advantage; that the price paid for the land was so grossly inadequate, being only a few dollars for property worth from \$700 to \$1,000, as to justify the conclusion that there was great irregularity and unfairness, in the transaction; that, among other irregularities, the lots of land, although not contiguous, were sold in one body, when they should have been offered separately, and that competition among bidders at the sale was prevented by the conduct of the defendant.

There was much testimony at the trial bearing upon the questions more or less directly and remotely, and at the charge of the court, the jury returned a verdict "setting aside the sale." A motion was made for a new trial, upon several grounds, as well as upon various special grounds, which alleged errors in the rulings and charges of the court, and which, upon being heard, was overruled, and the case stood upon the judgment of the court refusing the new trial. No error is assigned.

None of these grounds were insisted upon here, except the following, viz.: That there was error in instructing the jury to inquire whether the defendant was an innocent purchaser, and in order to ascertain that fact, they might inquire whether he was the owner

execution making the sale, and whether he directed the levy thereof, and the advertisement under the levy; that if such were the case, these were circumstances from which they might infer that he had notice that the advertisement had been published less than the time required by law, if such was the fact; that they might also look to the relations existing between the parties litigant, to determine the *bona fides* of the transaction, and to all the other circumstances in evidence, such as the real value of the land, the price it brought, the alleged gross inadequacy of consideration, and the occurrences at the sale that had a tendency to affect the price of the property offered; that anything which would put a reasonably prudent man upon inquiry as to the true state of the facts, was evidence from which actual notice might be inferred. This is the charge, in substance, to which exception is taken. We think it is substantially correct.

1. This court, in *Jordan vs. Pollock*, 14 Ga., 145, defined actual notice to be such as was positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally, because the evidence within his knowledge was sufficient to put him upon inquiry, and held there was no error in charging the jury that actual notice might be proved by the facts of the case, from which it could be inferred. This was said in relation to a third party, who had no connection with the transaction in its origin, but who afterwards became a purchaser of the property in question. It applies with redoubled force to one who was either the owner of the execution, or was attorney for the party owning it, when the levy was made, and who directed it, together with the advertisement of the sale under it, and who, in addition thereto, had just prior to that time represented complainants as their attorney in a litigation concerning the land in question, together with others, and who, for the purposes of the litigation, had in his possession all the evidences of complainants' title.

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In *Galpin vs. Page*, 18 Wall. R., 373, Mr. Justice Field who delivered the opinion, declared, "that a title acquired by an attorney engaged in the cause, at a judicial sale, made under a decree which had been reversed because of irregularity in serving an infant party, fell with the decree." The purchaser was one of the attorneys of the plaintiff in the suit in which the reversed decree was had, and "the law imputes to him knowledge of the defects in the proceedings which were taken under his direction and that of his co-partners, to obtain service upon the infant. The conveyance by him of an undivided half to his law partner, also one of the plaintiff's attorneys, was made after the decree of the district court had been reversed for want of jurisdiction over the infant. The partner also took his interest with knowledge of this defect. The protection which the law gives the purchasers at judicial sales is not extended, in such cases, to the attorney of the party, who is presumed to be cognizant of all the proceedings."

In the case at bar, the court did not charge that notice of this irregularity would be presumed from the fact alone that the defendant was the attorney of the plaintiff who caused the levy to be made, and the advertisement of the sale under that levy; the charge was more favorable to him than it seems the case cited would have justified; it was simply that notice to him might be inferred from this and other facts in evidence.

2. If there was error in the charge as to actual fraud, it was error against the plaintiff, and of which the defendant had no cause to complain. Actual fraud, it would seem, was not essential to setting aside the sale. It is true, that a misrepresentation wilfully made to deceive, or recklessly and without knowledge, acted upon by a party, would have this effect, but it is equally true, if it be made by mistake and innocently, to the detriment of another, and amounting only to a legal fraud, it would be equally effectual for that purpose. Code, §3174. The fraud that voids a sale may exist from misrepresentations made by

either party with design to deceive, or which does actually deceive the party; in case the party is deceived by misrepresentations, however innocently made, this will avoid the sale; and such misrepresentations may be by acts as well as words. Code, §§2633, 2634. It is laid down generally, that the court upon whose judgment the execution issues, has full power to set aside an execution sale whenever the end of justice and fair dealing require it, and to order a re-sale, or award execution anew, at discretion. This power is deemed a species of equitable jurisdiction, inherent both in courts of law and equity, and is invoked to remedy fraud or irregularity in the conduct of such sales, as between purchasers and the original parties to the suit. *Reveron Judicial Sales*, §1081, and citations in notes 1 and 2 there. For a fuller discussion of these questions, see *Parker, administrator, vs. Glenn and others*, decided today.

3. The finding in this case is in accordance with the decided strength and weight of the evidence. The verdict sets aside the sale, and does nothing more. That was the only issue really presented by the pleadings; all other matters were collateral and subordinate; they only tended to that end. The effect of the decree entered upon the verdict, and which follows it strictly, is simply to restore the parties to the situation they were in before the sale, with all their rights as they existed at that time. We indicate no opinion as to the course proper to be taken hereafter in the case for the adjustment and settlement of the rights of the respective parties.

Judgment affirmed.

Cutliff vs. Boyd et al., executors.

CUTLIFF vs. BOYD et al., executors.

[This case was argued at the last term, and the decision reserved.]

1. Generally, where exceptions of fact are filed to an auditor's report is *prima facie* evidence of the truth, and the party must overcome it; but where his report on the facts of the case was made without hearing both sides thereon, if it be legal to hear both, then such report is not *prima facie* evidence of truth on the issue as to which one side was thus excluded. Therefore, where the court sustained an exception to an auditor's report on the ground that one of the parties was not permitted to testify to the auditor as to a particular issue, but the other party was permitted so to testify, it was error thereafter to charge that the auditor's report as to such issue was *prima facie* true.
2. A verdict in these terms, "We, the jury, sustain the auditor's report as to exceptions 7, 8, 9, 11 and 14," was a substantial compliance with the requirements of law that the jury shall find exceptions *seriatim*.
3. The verdict is supported by evidence, and would stand but for error in the charge.
4. There was no error in charging that if notes were due in June, 1865, and were not sued on by January 1, 1870, they would be barred, unless there were some legal reason why the statute was suspended; nor as to the six year's statute of limitations.
5. There was no error in charging that, if the two distributees of the estate agreed that the will should be set aside, and that they would divide the estate equally, and that certain notes due to them were not to constitute a part of the estate, one of the distributees being the administrator, in a subsequent suit to set aside the will, such an agreement would be binding, and the other distributee could not claim that the notes were a part of the estate; but if the converse of the proposition were true, and they made such a division of the estate, and the notes of the other parties were to be included, then it would be the duty of the administrator to carry out the agreement.
6. There was no error in charging to the effect that the administrator of an estate could not of his own motion or volition, without the order of court, or without any accounting or settlement with any other distributee thereof, or without any agreement on the part of such distributee, take his distributive share and apply it to the payment of notes given by him.
7. Where a mother advanced money to her son and took notes for him, *prima facie* such notes represented an indebtedness, and not an advancement, but this presumption was subject to be rebutted.
8. The charge as a whole was sound, just and impartial.

June 10, 1881.

Cutliff vs. Boyd et al., executors

Practice in Superior Court. Auditors. Verdict. Statute of Limitations. Contracts. Administrators and Executors. Charge of Court. Before Judge STEWART. Fulton Superior Court. April Term, 1883

J. M. Cutliff brought complaint against Isaac S. Boyd and his wife, Mary L. Boyd, formerly Mrs. Holliday, widow of J. R. Holliday, as executor and executrix of said J. R. Holliday, deceased, on two promissory notes; one dated May 25, 1868, due one day after date, by J. R. Holliday, to plaintiff or bearer, for \$237.63; the other dated July 16, 1868, due one day after date, by J. R. Holliday, to plaintiff or bearer, for \$75.00. Defendants filed pleas, making, in brief, the following points: The general issue; that Holliday was imbecile and incapable of contracting; that he was almost entirely blind and dependent upon others for information as to the contents of any writing, and was not in the habit of making contracts, except under the supervision of his wife and brother (plaintiff, who was his half brother); that if he signed the notes sued on at all, he did not understand their contents, and his signature was obtained by plaintiff by reason of the confidential relations between them; that plaintiff was in the habit of endeavoring to get Holliday to leave him his entire estate, and pressed this purpose upon him in various ways, securing promises from Holliday when the latter was suffering from disease and incapable of understanding his rights and resisting plaintiff's influence, and of such promises he had no recollection whatever upon being partially restored; that he was never more than partially restored in the years 1868 and 1869, and died in the latter year; that, at the time these notes were given, Holliday had no need to borrow money or renew debt, he having ample cash means, and being in the habit of lending money through his agents; that plaintiff was one of these agents, and received on account of Holliday a considerable sum of money, for which an accounting was prayed; that plaintiff kept the

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existence of the notes sued on to himself until the death of Holliday, realizing that he was largely indebted to Holliday for sums received by him as administrator of the estate of one Lucinda Mabry, the mother of both plaintiff and Holliday; that in 1867 Mrs. Mabry died, leaving a large estate in real and personal property and in case that plaintiff administered on the estate, and without legal sales, disposed of the estates and property, and appropriated them to his own use, that plaintiff and Holliday were the sole heirs at law of Mrs. Mabry, who died with debts; that the amount in the hands of plaintiff due defendants from the estate is about \$6,000.00; that plaintiff would not be able to respond for this sum in an action therefor, and that the only chance of realizing upon the same is by an accounting in this action.

Plaintiff's attorneys acknowledged service on this plea and consented that an accounting in regard to the estate of Mrs. Mabry be had in this suit, on the principles and practice of equity. Plaintiff filed an answer to the equitable plea of defendants, denying substantially all of the equitable rights and charges set out therein, and especially denying all fraudulent or improper means of obtaining the notes in suit from Holliday, or that the latter was unable to transact business, or imbecile, or that plaintiff imposed upon him, or that, as the agent of Holliday, he had received or misappropriated any funds or property of the latter, or that he had kept the existence of the notes in suit a secret; and he alleged that the large note was given in renewal of a note from Holliday to him, made in 1858, for the purchase of a half interest in a plantation and stock thereon, and that the small note was given for a balance in money due him by Holliday. In regard to the Mabry estate, plaintiff alleged that he administered on it, sold the property according to the law governing administrator's sales, and that, after selling it, he appropriated the proceeds to his own use, in order that he might thus receive an equal share in said estate.

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with Holliday, inasmuch as he held, as administrator, notes of Holliday sufficient in amount to overbalance the sum received and appropriated by plaintiff. These notes were made payable to plaintiff as administrator of J. Mabry, the husband of Mrs. Lucinda Mabry, his estate having passed to the latter, and these notes constituted part of the estate of Mrs Mabry at her death.

The case was referred to an auditor. He found that, on an accounting between plaintiff and the estate of Mrs. Mabry, there was due by the former to the latter, for moneys received and undistributed, \$12,308.69, on September 23, 1881. He also reported that the administrator was not entitled to any credit on account of the notes of Holliday, because they ceased to be obligations of the latter, by reason of an agreement entered into between the two, to the effect that these notes should be destroyed, that the will which Mrs. Mabry had made should not be set up, and that Holliday and plaintiff should each take one-half of the estate, instead of Holliday's taking two-thirds and plaintiff one-third, as would have been the case if the will could have been established. He also reported that these notes were barred by the act of 1869, the debts having been contracted and become due prior to June, 1865, and not having been set up until 1877 (giving the answer the effect of a suit). He further reported that no evidence as to maladministration on the part of plaintiff had been introduced, and that there was no individual indebtedness from plaintiff to Holliday. Plaintiff filed fourteen exceptions to the report, only six of which it is necessary to set out. They are as follows:

(7.) "Because the auditor erred in finding that said notes of J. R. Holliday, the property of Lucinda Mabry at her death, and fully set forth in plaintiff's answer, are not chargeable to Holliday's estate, because barred by the act of 1869.—Plaintiff insists that, having these notes in his possession as the property of said estate, and having collected the assets of said estate before the bar of the statute

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applied, he had the right to appropriate the share of said Holliday in said estate to the payment of his, the said Holliday's, notes."

(8.) "Because the auditor refused to allow plaintiff a credit for the note of J. R. Holliday and J. M. Cutliff - security, payable to Dennis Paschal, for \$150.00, due December 11, 1859.—Plaintiff insists that, at the time he lected the assets of Lucinda Mabry's estate, said note a valid debt against said Holliday's estate, and he had legal right to charge it against the latter estate in his turns to the court of ordinary of Dougherty county."

(9.) "Because the auditor finds that plaintiff, as administrator of Lucinda Mabry, is indebted in the sum of \$1308.69, or in one-half of that sum.—Plaintiff says that the auditor should have allowed him a credit for each and all of the Holliday notes, and should have calculated interest thereon from the dates of maturity respectively to the time or times when plaintiff's returns to the court of ordinary showed that he had funds in hand collected on account of Lucinda Mabry's estate to discharge them, and that if this method had been adopted, plaintiff would have been indebted in no amount to defendants on account of said estate. Holliday's share in said estate would have been absorbed by his notes to said estate."

(10.) "Because the auditor refused to allow plaintiff's testimony, offered to disprove that of Mrs. Mary L. Boyd, as to the alleged contract to destroy the old notes and divide the estate equally between plaintiff and defendant's testator, it being considered that Holliday owed no debts, and that said Mrs. Boyd was the sole legatee."

(11.) "The report of the auditor was contrary to evidence in this, that, while he admitted plaintiff's answer to defendant's plea in evidence, he decided that said answer, so far as it related to the Holliday notes, had been overcome by the testimony of Mrs. Mary L. Boyd, and other corroborating evidence mentioned in said report."

(14.) "Because the auditor, in his alternative report,

finds that plaintiff is indebted to defendants in the sum of \$237.79½.—Plaintiff says that the auditor should have allowed plaintiff a credit for the said Dennis Paschal's note, and also for the \$1,500.00 note given in 1863 in full, and if he had so done, plaintiff would have been indebted nothing to defendants.”

The court overruled the exceptions numbered 1, 2, 3, 4, 5, 6, 12 and 13, sustained exception number 10 as matter of law, and submitted numbers 7, 8, 9, 11 and 14 to the jury, as presenting issues of fact.

The evidence was conflicting, and need not be set out in detail. One leading issue of fact was, whether, in the agreement between plaintiff and Holliday as to the division of Mrs. Mabry's estate, the notes made by each of them were to be cancelled, and an equal division had of the balance; or whether each was to account for the amount of the notes due by him, and an equal division was to be made on that basis. The will made by Mrs. Mabry, which was claimed to have been destroyed and to have been set aside by this contract, gave to Holliday two-thirds of the property, and to plaintiff one-third, and the notes of Holliday and plaintiff were in like ratio. There was also some question as to whether these notes were taken by Mrs. Mabry as debts, or as representing advancements made to her sons.

The jury found the following verdict:

“We, the jury, sustain the auditor in regard to exceptions 7, 8, 9, 11 and 14.”

“We, the jury, find for the defendants one hundred and sixty-three dollars and eighty-six cents.”

Plaintiff moved for a new trial, on the following among other grounds:

(1.) Because the verdict was contrary to law, evidence and equity.

(2.) Because the court, after reading exception 7 to the auditor's report, charged that *prima facie* the finding of the auditor on that point would be correct.

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(3.) Because the court, in referring to the notes, receipts and certificates given by Holliday to Mrs. Mabry, charged as follows: "Find if any suit was instituted upon them before January, 1870. If not, I charge you they would be barred."

(4.) Because the charge of the court on the subject of the statute of limitations and the act of 1869 was not applicable to the case.—According to defendants' claim, from the evidence, the notes, receipts and certificates of Cutliff and Holliday to Lucinda Mabry were cancelled by agreement, while plaintiff claimed that the agreement was that as administrator of said Mabry, he was to collect the balance of the assets and retain a sufficiency to make his distributive share equal to defendants' testator.

(5.) Because the charge of the court directed the attention of the jury to the statute of limitations and the act of 1869 as the controlling question; whereas, plaintiff in the controlling question was the terms and nature of the agreement between plaintiff and defendants' testator as to the division of Mrs. Mabry's estate.

(6.) Because the court, after reading exception 9 to the auditor's report, charged as follows: "Now, if you find these Holliday notes are part of the estate, then you will find against this exception, and would make your calculation, putting them into the estate, and find what would be the distributive share; but if you find, for any reason, against the Holliday notes, and believe he is entitled to his distributive share, then you would sustain exception 9."

(7.) Because the court, after reading exception 8 to the auditor's report, charged as follows: "Well, if you find that he did appropriate portions of this estate in payment of the debt, and if he had a right to do it under the charge I have given you in charge, you find in favor of that exception; but if you find the converse to be true, you find against it."

(8.) Because the court, after reading exception 11 to the auditor's report, charged as follows: "Now, the same

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would apply, gentlemen, as to whether you find for or against that exception."

(9.) Because the court charged as follows: "Now, if it appears from these notes that they were given prior to June, 1855, or if it appears they were not sued upon, or some other legal reason given why the statute was not suspended, and if not sued upon by the first of January, 1870, they would be barred, and could not afterwards be enforced at law, unless there was some reason shown why the statute was suspended. Now, it will be for you to say, as a matter of fact, when were these notes made. Find when they were sued upon, and whether or not they were barred before any suit was brought, either by bringing a suit or filing a cross action of set-off or suit by bill." — Plaintiff insists that the evidence shows that, as administrator of said Mabry, he had collected the assets before the bar of the act of 1869 applied and he was not required to bring suit to enforce the collection.

(10.) Because the court charged as follows: "But I charge you, gentlemen of the jury, that the plaintiff could not, of his own motion or volition, without any order of court, or without any accounting or settlement with Mr. Holliday, or without any agreement with Holliday, take his distributive share and apply that to the liquidation and settlement of these notes."

(11.) Because the court erred in charging the jury, in respect to exception 9, that "the finding of the auditor is *prima facie* true, as before stated to you."

(12.) Because the court charged as follows: "If that is true, if they agreed that the will be set aside, and were to divide the estate equally, and if their respective notes were not to constitute a part of the estate, the plaintiff could not plead it now, if he made such an agreement. But if the converse of the proposition be true, that they were to make such a division of the estate, and the notes of the respective parties were to be included, if such was the agreement, then it will be your duty to carry it out."

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(13.) Because the court erred in putting more stress and pointedly to the jury defendants' theory of defense than plaintiff's claim, to the prejudice of plaintiff.

(14.) Because the court charged as follows: "That to say, if you allow these Holliday notes, and should find in favor of the notes sued on, then, if you find that there is still something due, and find there is more due by plaintiff as administrator than these notes sued on, you will find in favor of defendants for that amount; but if you do allow the Holliday notes, and still find that the distributive share of the estate is more than these notes sued then you will find what excess is in favor of defendants and for that sum against this plaintiff."—Plaintiff insists that the conclusion of the court in the first clause of the sentence is incorrect, and that the finding would be legal in favor of the plaintiff.

(15.) Because the verdict was not returned on each exception of fact *seriatim*.

The motion was overruled, and plaintiff excepted.

R. N. ELY; GEO. N. & D. P. LESTER, for plaintiff error.

HILLYER & BROTHER, COX & HAMMOND, for defendants JACKSON, Chief Justice.

Cutliff sued Boyd and wife on two notes given by Holliday, on whose estate the defendants administered under his will, Holliday having been the first husband of M. Boyd. The defendants pleaded *non est factum* or its equivalent, invalidity of the notes on account of imbecility of body and mind of Holliday when apparently given, and thereby fraud and imposition on Holliday by Cutliff, his half brother, in procuring his signature to them, if given by him at all in that weak condition of body and mind, and a set-off against Cutliff in equity, because he owed Holliday more than the notes, by reason of having admini-

istered on the estate of Mrs. Mabry, the mother of both, and being thus indebted to Holliday his distributive share of that estate. The latter plea, in regard to the set-off, was submitted to Col. Moses, as auditor, and he reported thereon. The plaintiff, Cutliff, excepted to that report on fourteen grounds, the 1st, 2d, 3d, 4th, 5th, 6th, 12th and 13th of which were overruled by the court on legal grounds; the 10th was sustained on matter of law, it being the refusal of the auditor to hear Cutliff's version of an agreement between his brother, the deceased, and himself, which had been testified to by Mrs. Boyd, one of the defendants, in rebuttal of her testimony about that agreement; and the 7th, 8th, 9th, 11th and 14th, being issues of fact, were submitted to the jury. On the trial, the auditor was sustained by a verdict of the jury on all five exceptions, but in one verdict thus: "We, the jury, sustain the auditor in regard to exceptions 7, 8, 9, 11 and 14;" and the jury also found for defendants one hundred and sixty-three dollars and eighty cents, in a separate general verdict. A motion was made for a new trial on various grounds therein set out; it was denied, and error is assigned on that denial.

1. On a very careful examination of the whole record, and all the rulings of the court therein and charges to the jury, we are unable to detect but a single error, and that is the charge in the 11th ground of the motion, that the auditor's report is *prima facie* evidence of the truth, and the plaintiff must overcome it. Unquestionably, such is the general rule. Code, §3097. But where his report on the facts on trial of an exception thereto is made without hearing both sides thereon, if it be legal to hear both, then such report is not *prima facie* evidence of truth on that issue. In this case, the tenth ground of exception to his report was sustained and is not excepted to. The legal point was there decided, that Cutliff was a competent witness in rebuttal of Mrs. Boyd's account of what transpired between Holliday and Cutliff in respect to their mother's estate, and in what manner it was to be

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divided, and in respect to other matters touching that estate; but the auditor had held that he was not competent. So that the auditor had rejected competent testimony as to the true agreement between the brothers on an issue of vital importance in the case, and had heard only one side thereon, when he ought, in law, to have heard both. The dispute between them was, whether the brothers agreed, inasmuch as their mother's will was lost, and in consideration that neither would set it up or seek to do so, to divide the estate equally, each paying the notes he owed the mother, or whether those notes were not to be counted against either, and the estate was to be divided with regard to them. Mrs. Boyd swore one way, Mr. Cutliff another, on that issue before the jury, where Cutliff was allowed to be heard; and yet, what Col. Moses reported the same issue, where nobody but Mrs. Boyd was heard upon that issue, the court charged the jury was the truth *prima facie*, thus giving one side, on such an issue, the decided advantage of the other.

It may be that the verdict turned on that charge. It may be that the jury said, "well, here are two respectable people, both interested, one swore one way and the other differently, but the judge says that what the auditor says is the truth, unless overcome by Cutliff, and as Mrs. Boyd's word is as good as his, we will let the auditor's report stand." We are particular in saying "it may be" that this controlled the jury, because the verdict may have rested on the issue of the statute of limitations barring the collection of Holliday's notes to his mother; in which event this issue would have been immaterial, or it may have rested on this very issue upon the letters which Cutliff wrote to Ray and Hammond, giving the preponderance to Mrs. Boyd as the correct version of the agreement, as well as other circumstances looking that way. Yet the charge was error; it was upon an issue material in the case; that issue may have controlled the verdict; the erroneous charge may have controlled the

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g on that issue, and therefore it is safer to remand case for a new hearing. It will be seen from the d that the order itself, setting down these exceptions et for a hearing, follows §3138 of the Code, which de- as that "the report, when finally accepted, shall be itted as evidence to the jury, with such instructions as as effect to be given to it as the court shall give, under circumstances of each case." This provision was wisely orted in the statute, doubtless to guard against just such ate of facts as this issue presents, that is, where the litor ruled out competent evidence, and failed thus to ar all the facts. The error is the refusal to grant the w trial, not on the 6th ground of the motion,* which re- rs to the 7th exception, which is as to the limitation act ' 1869, but on the 11th ground of the motion which refers o the 9th exception, which is on the issue of whether or o Holliday's notes should be paid to Mrs. Mabry's estate efore he got his half, or he should get half without count- g them under the agreement.

2. Though the verdict is one, yet it specifies each excep- on by number, and is substantially in compliance with w.

3. The verdict is sufficiently supported by the evidence stand, but for the error above alluded to.

4. The charge on the subject of the statute of limitations, th the 6 years' statute and that of 1869, is not errone- us.

5. So on the subject of the effect of the agreement to set ide the will and divide the estate accordingly as the jury und the truth to be touching that agreement, the charge right. The consideration is ample to support the mutual omise.

6. So in regard to the right of the administrator of Mrs. abry, Cutliff, to settle up that estate with Holliday with- his consent or the adjudication of some court, surely charge must be the law. Code, §§2598, 2599, 2600; ry on Trusts, 427, 480.

* See (2) in report.

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the sentence, in regard to the marshal's costs, affirmed the mayor's judgment, and that affirmance is the error complained of here.

1. The accusation was demurred to, because it did not set out to whom the liquor was sold. This was unnecessary, and was not insisted upon in argument here.

2. The point relied upon here is, that the offense was within the crime of retailing spirituous liquors without a license under section 4565 of the Code, and the superior court therefore only had jurisdiction of the offense upon indictment of the grand jury, and the defendant had the right to be tried before a jury in that court. It seems to us that the principle ruled in *Rothschild vs. The City of Darien*, 69 Ga., 503, covers this case. There it was held to be that "a provision in a city ordinance making it penal to open any store on Sunday for the sale of merchandise of any kind or sort, works of necessity, etc., excepted," was as not covered by the state law, and could be enforced. This is was a well considered case, and authorities from prior decisions were all considered. The distinction between the ordinance and Sunday state law is there drawn.

In the case before us now, the ordinance of the city of Dalton providing for this offense is wholly unlike the provision of the Code cited—section 4565. That section declares:

"If any person shall keep a tippling shop, or sell by the quart, without the license and taking the oath prescribed in this Code, or sell by retail in quantities less than one quart, any wine, brandy, rum, gin, whiskey or other spirituous liquors, or any mixture of such liquors in any house, etc., or other place whatever, without license from the ordinary of the county, or without license from the corporate authorities of any town or city, where by law authority to grant license is vested in the corporate authorities of such towns or cities, such person," etc.

So that the provision in the penal Code is wholly unlike, and makes different offenses from, that made by this ordinance. The Code makes it punishable to sell by the quart or retail without a certain oath and getting license from

rate authorities, where they have power to grant this ordinance provides for punishing without re-
 cense or oath or quantity; the ordinance is prohi-
 re and simple; the Code is license, on condition
 taken and a certain revenue or tax collected by
 ty or city; this ordinance embraces any intoxi-
 quor, whether spirituous, malt or fermented; the
 braces only wine, brandy, rum, gin, whiskey or
 rituous liquors or any mixture of such liquors,
 ut malt and fermented and all other intoxicating
 any kind; any liquor which makes drunkenness
 ited and punished by the ordinance; only that
 spirituous, by the Code.

ts of this case show the distinction. Defendant
 have been convicted under the Code. There is
 that he sold either of the liquors enumerated in
 , or any spirituous liquor, or any mixture of the
 ere enumerated. This must have been proved
 isfaction of the jury, beyond a reasonable doubt,
 erior court, under the Code; but the proof is full
 old something which made men drunk. What it
 dy seemed to know; but that it intoxicated, and
 to the prohibition against selling any intoxicating
 clear. It is clear that he violated this ordinance;
 tful, to say the least, that he violated the Code.

swore that in the ginger ale, or ginger pop, he
 here was whiskey, because of the smell, but he did
 r or swear with any sort of certainty to it.

, seems clear that the offenses are different, and
 g in *Rothschild vs. Darien* controls the case.
 did not, the very section 4565 of the Code does;
 acts this proviso: "Provided no person shall be
 indictment in the superior courts of this state for
 n of this section, when said person has been
 ried by the corporate authorities for the same

, had it been the same offense, the enactment is

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that the corporation had jurisdiction as well as the superior court.

That the city of Dalton had ample power to pass an ordinance under which the plaintiff in error was punished. See the charter of the city, in acts of 1874, pp. 182-185-6. This charter shows absolute authority over the whole liquor question. It gives the corporation power to grant license, and thereby raise revenue to go into the coffers instead of into the coffers of the state, and thus to make the traffic pecuniarily profitable, or to refuse license and thereby prohibit the traffic, and thus to make the prohibition of the traffic socially and morally profitable. It checks the latter wisely, and the courts should be slow to overturn policy and declare it untenable, on constitutional and legal grounds; and should not do so except its action was shown to be manifestly illegal or unconstitutional. Such does not appear from this record. If not the same as the state law, most clearly it is no violation of the constitution; because that instrument only requires trial by jury for offenses against the state. If the same as the state crime even, then general power or right existed before the constitutions of 1868 and 1877 to try for this offense by the corporate authorities, and the fact that Dalton's charter was subsequent makes no difference. The license law, or power to grant license, was a general law as to all municipal corporations, and inhered in the very existence of such corporations whenever created. Section 4565 of the present Code is identical with section 4440 of that of 1863, which was compiled in 1860, and evidently nobody contemplated that the police courts of cities or towns should have juries. The constitution of 1877 provides for other courts, and the provision on jury trial must be construed in connection with this grant. By the 1st paragraph, of the 18th section of the 6th article of the constitution, Code, §5174, it is declared that "the right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate," *etc.* The words "except where otherwise provided," *etc.*, as

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construed in *Freeman et al. vs. McDonald et al.*, took the proceeding to test an election for city officers out of trial by jury, on the facts of such a contest for office, which office is property. See that case, this term, not yet reported.

So the words "shall remain" take all matters of police power in cities without the operation of that paragraph; because there never had been in this state such jury trials in police courts, and therefore there was nothing to remain inviolate in the matter of jury trial in such courts.

If paragraph 5th of the bill of rights in article 1st of the constitution be invoked, Code, §4997, and relied upon as giving such right of jury trial, then this provision is no bar to this police trial; first, because this is an offense against the city, and not against the laws of the state, as we have seen above; and secondly, because such or equivalent provisions in the constitution of the United States and all the constitutions of this state, have never been held to apply to police of cities and towns and arrests and trial, with fine and imprisonment therein, under ordinances thereof. See Cons. of 1798, Sec. 5, Art. 4, Cobb's Digest, p. 1125, and all other constitutions of Georgia to this day, and Cons. of U. S., par. 3, Sec. 2, Art. 3, and amendment, Art. 6, Cobb's Digest, p. 1109; *Williams vs. City of Augusta*, 4 Ga., 509; *Floyd vs. Town of Eatonton*, 14 Id., 354; *Perdue vs. Ellis*, 18 Id., 586.

It is well that such is the law, the constitutional law; for if no man could be fined or imprisoned for violation of city police ordinances, except by jury trial on indictment, away would go all power in our municipal authorities to preserve peace and good order within their corporate powers.

Judgment affirmed.

Guess et al. vs. The Stone Mountain Granite, etc. Company.

**GUESS *et al.* vs. THE STONE MOUNTAIN GRANITE, ETC.,
COMPANY.**

[This case was argued at the last term, and the decision reserved. Jackson, Chief Justice, being related to parties, did not preside.]

1. Where a bill had been filed to enjoin several common law actions, and in consequence they were tried with the bill, and both parties introduced testimony, the complainant in the bill was entitled to open and conclude the argument.
 2. In an action for damages against a company which carried granite from its quarry to the main line of a railroad by means of a railroad of its own, which passed through the street of a village, by reason of which it was alleged that injury resulted to the owners of property abutting on the street, danger of possible collision of animals and persons with the trains running on the track along the street, or of persons or animals being thereby frightened, were not elements of damages.
 3. The judgment rendered in this case when formerly before the court (67 *Ga.*, 215) estopped the respondents from contesting the right of the company to use this street for the purposes of its road as well as from calling in question the power of the town council to enter into a contract with the company, authorizing it.
 4. The questions to be submitted to the jury on the last trial were whether the property of the complaining parties had been injured by the company's use of the street, whether this injury was permanent, and if so, to what damages they were entitled. There was no error in restricting the inquiry to these points.
 5. The actual damage sustained by the property owners in consequence of the building of the road and the use of the engine thereon, was what they were entitled to recover. If these damages did not exceed the increase in value of the property by reason of the company's improvements, they suffered no injury; and evidence to show such increase in value was admissible.
- (a.) While it would have been better not to have referred to the improvement of property other than that of the parties in litigation, such reference did no injury.

February 19, 1884.

Municipal Corporations. Corporations. Practice in Superior Court. Damages. Railroads. Streets and Sidewalks. Before Judge HILLYER. DeKalb Superior Court. March Term, 1882.

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Guess, Swift, Johnson, Winningham, and Nesbit and Smith, trustees, brought suits to the March term, 1881, of DeKalb superior court, against the Stone Mountain Granite and Railway Company, to recover damages for injuries to their property, alleged to be occasioned by the occupying and obstructing by the defendant of a public street in the town of Stone Mountain, known as Church street. On Septembr 1, 1881, the company filed their bill against the defendants, alleging, in brief, as follows: It was chartered in 1870, and by its charter was given "the right to construct and operate a railroad from the village of Stone Mountain to and around the Stone Mountain, and to connect the same with the Georgia Railroad Company's road, with the latter's consent." In order to do this, it was necessary to run the road along some of the streets of the village. On December 1, 1869, the board of town commissioners passed an ordinance allowing the company the right of way through and across Main street and any other street necessary to be passed over or crossed to construct a road from the Georgia Railroad to the quarries at the mountain. The company has complied with the condition of the ordinance, namely, the payment of a rent or tax of \$25.00 per year. In 1870, the road was built from the line of the Georgia Railroad across Main street and the company's land, into and along Church street, for about four hundred and twenty-five feet to the land of the company, and thence to the base of the mountain. This was used for a number of years, and then its use was discontinued until 1880, when the road-bed was again repaired, the road relaid and again put in use. The company has improved Church street by building rock walls and macadamizing the same; and all damage to anyone is denied. A light engine is used for running at a slow speed, not exceeding five miles per hour. The prayer is that past, present and future damages, by reason of the use and occupancy of the street, be determined, and upon their payment, that *suits be enjoined.*

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Defendants to the bill (plaintiffs in the common law actions) filed an answer and cross-bill, alleging, in brief, -as follows: It was not necessary to run the track along the streets of the town, in order to connect with the Georgia Railroad. The ordinance confers no power to occupy Church street, and is a mere semblance of authority for a trespass. The present road is not like that used in 1870. The original road was on the side of the street, did not alter the grade of the street, used trestles and not embankments, and was operated by horse power and not by steam. The obstructions built in 1870 disappeared years ago. The road built in 1880 occupies the entire street, and at places most of the sidewalk; consists of deep cuts and high embankments; it occupies Church street for nine hundred feet, and causes damage to the property owners, by rendering the street almost impassable, making it unsafe for the vehicles and passengers and jarring the houses. The company uses an old and dilapidated engine, which casts soot, smoke and cinders upon the premises and into the houses of the adjoining property owners; runs at irregular intervals; is not under good control; is dangerous to passers, and makes loud and unpleasant noises. In consequence of these things, and also of the erection of a shed for this engine near the property of Guess, and the danger of fire from the sparks, etc., of the passing engine, they have been greatly damaged. Church street and adjacent cross streets were dedicated for the use and benefit of adjoining property owners, and the fee thereto is in them, subject to the right of the public to use them as highways and of the corporate authorities to repair them, etc. By reason of the change of grade, the property of defendants has been rendered inaccessible and otherwise damaged. By reason of the institution of these suits and a subsequent spell of dry weather, Church street is in better condition than the suits were begun. The company has no charter to construct and use the line through this street; and had, such power would be unconstitutional. The

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cross-bill was that the company be "enjoined from running a steam engine to propel cars or for other," along Church street, and for general relief. By ent to the cross bill, damages were prayed as in the common law suits.

vidence was very voluminous and conflicting. In understand the points made, it will be necessary nly the following summary:

vidence on behalf of the complainant was, in brief, s: The company was chartered, obtained per- of the commissioners of Stone Mountain to build built it, allowed it to fall into disuse, and subse- rebuilt it, as stated in the bill. On the second the principal portion of the road did not alter : of the street more than a few inches. At one laces, near the property of some of the plaintiffs mmon law suits, there was a grade of a few feet. ng the road, the company did not keep the street pair longer than was necessary. They filled and ized the street, built rock walls, and rendered it re passable than it was before. None of the prop- the plaintiffs in the common law suits was ren- accessible. Taking into consideration the im- nt of the street and the business done by the ; property owners on the street were benefited njured by the line. The engine used by the com- s a second-hand wood burner, not suitable for gen- vey transportation, but reasonably suited for the of the company. It did not cast more smoke, cinders than an ordinary wood burner. There- cient room between the railroad and the sidewalk les to pass. When the engine was put up at out six P.M., there was some noise from the escap- n, which lasted for probably half an hour, until e had cooled. Church street extended a short from the church, and thence the road passed over of complainant.

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The evidence on behalf of the defendants in this case was, in brief, as follows: The town of Stone Mountain was laid out by one Johnson, and Church street and cross streets were laid out for the benefit of purchasing property. They were worked out, and Church street extended to the base of the mountain. The original road was built, the obstructions disappeared, and a new road of the company was built, as stated in the answer to the cross-bill. By reason of the cuts and grades in it, the road has been backed upon the property of some of the defendants, and the property of others rendered almost impassible. The engine used by the company is an old steam hand machine, which throws clouds of smoke, soot and cinders upon the premises of these defendants, filling their houses at times, injuring the furniture, and rendering the atmosphere almost intolerable. There has been much difficulty in passing of vehicles upon this street since the construction of the road. The improvement of the street by the company has been, in considerable part, since the beginning of suits. The passing of the engine is very annoying, shaking the glasses, jarring the houses and rendering the road dangerous for the children of neighboring families. By reason of the grades, etc., the road was rendered very rough, and remained almost impassable until recently. The engine-house is near the property of Guess, and of these defendants, and when the engine is put up at it makes a mournful noise until the steam dies out, and this occurs again in the morning until the steam "gets up." The injury to the property of defendants was variously estimated at from twenty-five to fifty per cent of its value.

The jury found the following verdict: "We, the jury, find that the improvements made by Stone Mountain Granite Company, on the enhancement of property, cover the damages for the past, present and future, and all other law suits be enjoined, so long as said company keep the street in good repair."

Decree was entered accordingly.

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Defendants in the bill moved for a new trial on the following grounds:

(1), (2.) Because the verdict was contrary to law and evidence.

(3.) Because the court held that complainant in the bill had the right to open and conclude the case.

(4.) Because the court excluded the testimony of James R. Smith and other witnesses, by whom respondents offered to prove that the property on Church street was inaccessible with conveyances, not by reason of the condition of the street, but by reason of the danger to such vehicles, occupants of such vehicles and animals drawing them; not only from physical injury from danger of coming in contact with such engine and cars, but from apprehended danger, the result such as might and likely would occur from animals being frightened; and further, that the occupation of said street by the running of the engine and cars thereon was a virtual exclusion of its use by respondents, and the public, of it as a street or highway, with vehicles drawn by animals; and because the court further excluded the testimony of said witness and other witnesses by whom respondents offered to prove that the market value of the Guess, Swift and Johnson residences has been lessened, both in the purchase price and for rent as family residences, by reason of apprehended personal injury to the occupants, and especially to children, by the running of the locomotive and cars on said street.

[The court certified as follows: "As to the fourth ground, the court held that danger of collision of persons or of animals being frightened were not elements of damage in the eye of the law."]

(5.) Because the court permitted J. W. Tuglie and J. W. McCurry to testify that the occupation and use of said street by the complainant, with its engine and cars, had enhanced the value of the property in said town. The objection was that the testimony was irrelevant.

(6.) Because the court admitted, over objection of re-

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spondents, the permission granted to complainants by commissioners of Stone Mountain to occupy said street with its track. The objection was that the commissioners had no chartered right to grant said privilege, and said permission did not authorize a change of grade in the street or the use of the same by cars propelled by steam.

(7.) Because the court charged as follows: "If you believe from the evidence that the improvements made by the complainants in said town have added to and enhanced the value of respondents' property, and other property of the town, to an amount equal to the damage done respondents' property, respondents cannot recover."

(8.) Because the court instructed the jury that if they found that the engine used by complainants was unsafe or not reasonably such a one as would cause the least injury or annoyance to the occupants of said street, they could consider it as an additional element of damage to the property of such as were damaged thereby.—The objection to this charge was stated as follows: "Respondent praying that its use be enjoined, and so requesting of the court in their argument to the jury."

(9.) Because the court instructed the jury that, if Guess was damaged by the engine while in the engine-house with smoke, soot and noise, they would consider that an element of damage, and compensate for it.—Objected.—"Respondent, Guess, requesting that, if found to be a nuisance, it should be abated or enjoined."

(10.) Because the court instructed the jury that, in case of abandonment of the street by the municipal authorities of the town of Stone Mountain, the fee would revert to the adjoining land owners; and they could look to the evidence and see if such was the case; that without consent of the abutters, the municipality could authorize the use of the streets for gas pipes, street railroads and telegraph poles, and such would not be additional servitude and they could look to the evidence and see if such use

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like use had been granted to complainant by the municipality.

(11.) Because the court refused the following charge : "The presumption of law is, that the street to its center belongs to the owner of the land on lots adjacent to such street on each side, and the burden is on the Granite Railway Company to show that it does not ; and neither the legislature nor the municipal authorities could grant the right to said company to occupy said street with its road bed, and run its engine upon it without compensation ; and said land-owners are entitled to recover such damages as the evidence may show you that said property has been impaired by the occupation of said street."

(12.) Because the court instructed the jury that the occupation of said street by complainants as a railroad, to run cars thereon propelled by steam, was legal and authorized by law.

[In connection with the tenth and twelfth grounds, the court certified as follows : "The court merely charged the principles laid down by the Supreme Court in this case ; and further, that there would be no abandonment unless the new use was so inconsistent a dedication as to amount to an abandonment."]

The motion was overruled, and defendants excepted.

L. J. WINN, for plaintiff in error.

HOPKINS & GLENN, for defendant.

HALL, Justice.

1. This case affords no reason for a deviation from what should be considered as settled practice as to the right to open and conclude the argument, where a bill has been brought to enjoin several common law actions, and where they, in consequence, are tried with the bill. Where both parties introduce testimony, the complainant in the bill has the right to open and conclude the argument, as was held by this court in *Iverson vs. Saulsbury*, 63 Ga., 724.7?

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2. There was no error in holding that the danger of possible collision of animals and persons with the trains running on the track of the railroad along the street, or of persons or animals being thereby frightened, were not elements of damages. Were this otherwise, it would be impossible to construct and use any railway over which cars were moved by steam in any place in the vicinity of a public highway or street, or along a portion of the same. The complaint that testimony was rejected going to show that this track was so constructed as virtually to exclude the respondents and the public from the use of the street by vehicles drawn by animals, does not appear to be well founded. The record shows much testimony *pro* and *con*, bearing on the point. The approval of this ground of the motion for a new trial was qualified by the presiding judge to this extent only.

3. When the bill was before this court, upon exceptions to the injunction restraining the common law suits, asking that the same be tried together with the bill, it was held that there was equity in the bill, and that the injunction was properly granted; and also that, whilst complainant was a private corporation, and not a public carrier, organized for any great public purpose, like roads from town to town, and could not exercise the right to take private property for public use, even with compensation, against the will of the owner of that property, yet it had the chartered right to run a road from Stone Mountain to the quarries at the mountain itself, to haul the granite to the Georgia Railroad, and to connect therewith by purchase or lease, or other leave given by the owners of the property along their route; and as the company shows the grant of the use of the street in question by the town council of the town of Stone Mountain, it was not to be treated as a mere interloper or trespasser, against which, as a suitor, a court of equity would close its doors. 67 *Ga.*, 215, 216, 217. Why was it not a trespasser, if the authorities of the town of Stone Mountain had no power to treat with it?

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for the use of its streets, and to grant it that right, in consideration of an annual sum agreed to be paid and of an obligation to improve and keep in repair the street so used? It is clear to us, if no such right existed, the company could necessarily be a trespasser in making such use of the street, and, as a wrong-doer with unclean hands, could not gain entrance into a court of equity. The respondents are estopped by this judgment from contesting the right of the company, therefore, to use this street for the purposes of their road, as well as from calling in question the power of the town council to enter into a contract with the company authorizing it. This view of the matter disposes of several questions insisted upon with earnestness and ingenuity by the able counsel for the plaintiffs in error; the discussion of these is foreclosed by the prior adjudication of this court in this very case. We differ from our learned brother as to the extent of that decision, and think that it determined something more than that there was no abuse of discretion in directing the injunction to issue according to the prayer of complainant's bill.

4. The injunction sought by the cross-bill was refused, and the course pursued by the judge, in that respect, was commended as "legal, wise and just." The question as to the mode of running the cars, as then shown by the answer and affidavits of the defendants to the complainants' bill, was left open for future regulation by the final decree of the court, and if the evidence on the trial required it, the company might be constrained thereby to improve that mode, and held liable for past as well as future damages, if the property lying on the street should appear to be permanently injured. The questions then to be submitted to the jury on this trial were, whether the property of respondents had been injured by the company's use of the street, and whether this injury was permanent, and if so, to what damages the parties were entitled. These were the points submitted to the jury on the trial of the case, and the court did not err in restricting the inquiry to these

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points, and instructing the jury, as complained of in the 8th and 9th grounds of the motion for a new trial, "If the jury found that the engine used by complainants was unsatisfactory or not reasonably such a one as would cause the least injury or annoyance to the occupants of said street, they could consider it an additional element of damage to the property of such as were damaged thereby," or "that if the defendant, Gaess, was damaged by the engine, while the engine-house, with smoke, soot and noise, they would consider that as an element of damage and compensation for it." The court could not, as it seems to us, make this a ground, as was insisted, for enjoining the use of the engine and track. This object would have been better secured by the award of damages for the past, as well as the future, if the evidence warranted such a finding. The rights of both parties would have been thus secured. The plaintiffs in the several common law suits would have gotten what they sought thereby, and there would have been no such interference with the franchises of the company as would have deprived it of their proper and legitimate use.

5. The actual damage sustained by the parties, in consequence of the building of the road and the use of the engine thereon, was what they were entitled to recover in their several suits. If these damages did not exceed the increased value of the property by reason of the company's improvements thereon, then they suffered no injury. *City of Atlanta vs. Green*, 67 Ga., 386; *Moore vs. City of Atlanta*, 70 Ga., 611. Consequently, there was no error, either in the admission of testimony bearing upon this question, or in giving this principle in charge. Doubtless it would have been better to have omitted from the charge all reference to the improvement of other property than that of the parties. The inadvertent use of these terms, "and other property of the town," we are satisfied, did no injury to the parties complaining. When taken in connection with the context, it is evident that the jury were not instructed to make them account for benefits to other property than

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their own; and that the jury were not misled by the charge is quite certain, for they found that "the enhanced value of the property covered the damages for the past, present and future, and that the common law suits be enjoined, so long as the company kept the streets in good repair."

All the other special grounds of the motion for a new trial have been disposed of by what we have heretofore said, and by what was decided when the case was before the court on a former occasion. The verdict, if not required, was certainly sustained by the evidence.

There was no material error, either in the charge or the rulings of the court, to which exception was taken.

Judgment affirmed.

 PEEL, trustee vs. BRYSON.

1. Fraud which will prevent a debt from being discharged in bankruptcy, under §5117 of the revised statutes of the United States, is positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.
- (a.) If a debt originated in such fraud, the discharge of the defendant in bankruptcy would not protect him. Nor is the character of the claim affected or changed by having been reduced to judgment when the defendant was adjudicated a bankrupt.
- (b.) Where a declaration alleged that the plaintiff purchased from the defendant and his partner a certain lot, for a price stated, and took a conveyance in the usual form, and containing the usual warranty of title, and charged upon them deceitful and fraudulent representations in relation to certain incumbrances, claims and liens which they knew existed upon the land, and which they concealed from the plaintiff, and by means of this fraud and concealment sold the premises to the plaintiff, whereby the plaintiff was damaged a stated amount, and process was asked calling upon the defendant to answer the plaintiff in an action on the case for deceit, the debt so sought to be enforced was one originating in fraud, and from which the bankruptcy of the defendant did not relieve him.
- (c.) An express warranty knowingly false may be waived as a contract, and an action may be brought for deceit.
- (d.) If the declaration were defective in not setting out with suffi-

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cient certainty that the plaintiff acted on the alleged fraudulent representations, this would be a ground for demurrer, but would not be sufficient to arrest the judgment, nor would it change the entire character of the suit, so as to convert it from one *ex delicto* into one *ex contractu*.

(e.) Form of verdict in such cases suggested.

2. Where a declaration alleged that F. M. Jack and Thomas M. Bryson, both of the county where suit was brought, were lately partners, using the firm name and style of Jack, Bryson & Company, and the sheriff returned that he had served the defendants, Jack, Bryson & Company, in person, with a true copy of the declaration and process, such return was not void for uncertainty.
3. The fact that the limitation act of March 16, 1869, bars the right as well as the remedy, does not deprive the court of jurisdiction to hear and determine causes within its provisions. If a defendant desires to take advantage of that act, he must plead it; if he fails to do so, he waives it, and a judgment against him is good.

April 25, 1884.

Fraud. Bankruptcy. Statute of Limitations. Service. Deceit. Actions. Pleadings. Before Judge HAMMOND. Fulton Superior Court. October Term, 1883.

Reported in the decision.

GEORGE S. THOMAS; T. P. WESTMORELAND, for plaintiff in error.

L. J. WINN, for defendant.

HALL, Justice.

By consent of counsel, this cause was heard and determined by the presiding judge, upon issues both of fact and law. The affidavit of illegality contains two grounds:

(1.) That defendant in execution did not owe the debt and was never served with process in the original suit on which the judgment was rendered from which the execution issued, and had never waived such service.

(2.) That, after the judgment was rendered, affiant was adjudged a bankrupt, and was thereafter discharged; that the judgment was a debt provable in bankruptcy, and was ex-

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tinguished by the discharge. The court, upon the facts in proof, sustained the last ground, which we shall first consider.

1. Whether the judgment in bankruptcy, discharging the affiant from the payment of debts existing previously to his adjudication, includes the claim in question, depends upon its being within the class excepted from the operation of the discharge by the act of congress. Section 5117 of the Revised Statutes of the United States provides "that no debt created by fraud," among others named, "shall be discharged in bankruptcy." The Supreme Court of the United States, in *Neal vs. Clarke*, 95 U. S., 704, decided that "fraud," as used in this section of the bankrupt act, meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality; and that, where a party paid an executor for a portion of the assets of an estate which he purchased at a discount, but without any actual fraud, and where he was, with the executor, who failed to account therefor, made liable for a *devastavit*, and was subsequently discharged in bankruptcy, such discharge was a complete defence to an action against him for the *devastavit*. The same court, 99 U. S., pp. 1, 7, commenting upon and quoting from this case says, "with this definition we are content. It is founded both on reason and authority. Clearly, it does not include such fraud as the law implies from the purchase of property from a debtor with intent thereby to hinder and delay his creditors in the collection of their debts. But if it did, such a purchase does not create a debt from the purchaser to the creditors. As between the debtor and the purchaser the sale is good, but as between a creditor and the purchaser it is void. The purchaser does not subject himself to a liability to pay the creditors the value of what he buys; all the risk he runs is that the sale may be avoided and the property reclaimed for their benefit. To come within the exception of the bank-

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arrest the judgment, nor would it have the effect of changing entirely the character of the suit; it could not convert an action *ex delicto* into one *ex contractu*, which, as it strikes us, would have been the result of the view entertained by our esteemed brother of the circuit court bench.

The fact that the verdict rendered in the case was for the aggregate amount of five hundred and eighty-three dollars and seventy cents, made up of so much principal and so much interest, each specially found thereby, does not authorize or justify the conclusion that the cause of action was different from what it purported to be, as set forth in the plaintiff's declaration. The verdict will be, interpreted by the pleadings, and will not be set aside or disregarded on account of such an informality. If the declaration had contained two counts, one on the warranty of title and one for the deceit, and the party had gone to trial with an election, as was done in *Dye vs. Wall ut sup.*, on which count he would rely, then the form of this verdict would have authorized, and perhaps have compelled, the conclusion that it was found upon the count for breach of contract, but we have seen that this declaration contained only a single count, and that was for the fraud and deceit of the defendant in making the sale and warranty, and to give the verdict effect, it must be considered as finding the defendant guilty of the wrong charged upon him. To avoid such questions in future trials, we suggest that the jury should be instructed to find the defendant guilty, and to assess against him the amount of damages for which he is liable under the proof. These views lead us to the conclusion that the debt in question was created by the actual fraud of the defendant, and that it was not barred by his discharge in bankruptcy.

2. But conceding that the court erred in his ruling on this ground of the affidavit, still it is insisted that he should have found the issue made by the other ground in favor of the defendant. The return of the sheriff that he had served the defendants, Jack, Bryson & Co.,

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in person, with a true copy of the declaration and process, it was said, was no return at all; it was void for uncertainty. We do think not so. Upon looking to the declaration, we find the averment, that Francis M. Jack and Thomas M. Bryson, both of the county in which the suit was brought, were lately partners, using the firm name and style of Jack, Bryson & Co. There were, therefore, only two defendants, and the return was, on the face of the pleadings, sufficiently certain. It is more specific than this return: "I have this day served the defendants with a copy of the original, at their residence," which was held to mean that each of the defendants was served at his residence, and to be sufficient. 59 *Ga.*, 607; 64 *Id.*, 147, 4th head-note. The defendant denied, both in his affidavit and upon the trial, when he was a witness, that he had been served, but was contradicted by the return itself, and by the oath of the officer making it, who swore to its correctness.

We do not pass upon another question argued in connection with this, viz.: that this return should have been traversed by the defendant, in order to entitle him to have this ground of his affidavit considered by the court, only because it is not essential to the determination of the question made. It is not apparent that any such question was made or passed on in the trial, and we think that the court was right in virtually finding against this ground of the motion.

3. The fact that the act of March 16th, 1869, pp. 133 and 134, bars the right as well as the remedy, does not deprive the court of jurisdiction to hear and determine causes within its provisions, as was insisted, on the argument here, by the able counsel for affiant. This is the very question that the act makes it incumbent upon the court to determine, when made by the pleading, and there is no reason why a party may not expressly, or by his failure to set up the defence, as was done in the present case, waive that the legislature never intended to prohibit a court

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from taking jurisdiction of, and giving judgment in, a case, where a party was willing to respond to his liabilities, or meet his obligations, legal or moral, to discharge his debts, is so evident that all reasoning upon the subject would be a mere waste of time.

Judgment reversed.

 FRANK vs. THE ATLANTA STREET RAILROAD

1. Wherever there is conflict in the testimony on all the controlling points in the case, though the judge, after verdict, may grant a trial, he cannot, before verdict, grant a non-suit at law, or a dismissal, in the nature of a non-suit, in equity. new dis
- (a.) A motion to dismiss a bill in equity, with the facts elicited from the witnesses and the written testimony all in and before court, is analogous to a motion for a non-suit at law, and the same general law is applicable to each case. FROM t b
- (b.) The remarks in 65 Ga., 311, and 66 Id., 195, indicating the contrary rule, were *obiter dicta*. CC
2. In equity trials in this state, wherever the truth of the facts is in dispute, the statute is imperative that the final decision thereon shall be by a jury. //
3. So far as the province of the jury to try facts in dispute is concerned, it is immaterial what degree or *quantum* or certainty of evidence may be necessary by law to give relief in the case in equity. It is for the jury to find the facts, under the charge of the court, in one form or another of jury trial, either by general or special verdict. //
4. The plaintiff in this case is entitled to have the jury pass upon the facts thereof, so as to give to the chancellor those facts as they really exist, that he may apply to them the principles of equity and make an equitable decree thereon. //

April 25, 1884,

Non-suit. Practice in Superior Court. Equity. Before Judge HAMMOND. Fulton Superior Court. October Term, 1883. //

Reported in the decision.

MARSHALL J. CLARKE, for plaintiff in error.

MYNATT & HOWELL, for defendant.

n, Chief Justice.

plaintiff in error brought her bill in equity to reform executed by her to defendant in error, on the ground written and delivered. it contained a mistake in boundary therein set out, and if not such a mutual mistake equity would relieve and reform, then a mistake about by such fraud in the use of deceptive means terms of the deed itself and the plats furnished her, which was exhibited and attached to the deed, and which were furnished by agents of the defendant to to cause her to mistake the quantity of land she ed, and by the number of feet conveyed to include t-feet alley, which furnished her ingress and egress from another alley of ten feet width, and thence to lic street. At the close of the complainant's testimony was moved that the court dismiss the case, because nant had not made such proof as would entitle her to e jury, which motion was then denied; but at the defendant's testimony, and pending the argument dant on the evidence, the court reconsidered its and after argument dismissed the case, withdrawing e jury further consideration thereof. On the judg dismissing the whole case, on law and facts, without ing the jury to pass upon the facts, under the charge court, on the principles of equity applicable there- complainant excepted, and assigns for error that it. So that the question is, was there enough evi- a connection with logical and legitimate inferences m, to entitle the complainant to have the facts of —the verdict thereon—the truth of the transaction out and found by that tribunal which the consti- nd laws of this state organize to pass upon facts, ose facts make no case to entitle the complainant er in any reasonable view of them which the jury ke?

motion to dismiss a bill in equity, with the facts

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elicited from the witnesses and the written testimony in and before the court, is analogous to a motion for a verdict at law, and the same general law is applicable to equity. It is equivalent in either case to a demurrer to the whole case made on the entire facts. It is the same as if all the facts in proof in the equity cause had been set out in writing in the bill, and on demurrer for absence of all equity therein, a motion to dismiss the bill had been made, with this important distinction, that the law, in case of conflict of testimony, requires that the jury shall find the facts, the real evidence, and not the court. When the true facts are put on paper by the jury, in answer to questions propounded by the court, or under the charge of equitable principles by the court, by a general verdict, then the jury, then the court decrees what should be done according to equity, on either form of verdict.

The difference in the two modes of getting at the truth is that, in the question and answer form, the facts are found, without embarrassing the jury with the inferences which grow out of those facts, while in the form of a general verdict, the equities are told to the jury by the court first in his charge, and they find then the facts, and then the equities to those facts in the general verdict. In all cases, the decree follows the true facts, the verdict, when brought out of conflict by the jury in one mode or the other. It would seem, therefore, under Georgia law, that practice under that law, wherever there is conflict of testimony, can be no non-suit at law and no withdrawal of a case from the jury, for the reason that wherever there is conflict of testimony, the true facts are not known to the court and cannot be known until that conflict is made plain by the power which the law of this state vests in the jury to tell the court which witnesses are truthful and which are not, where they differ on any matter touching the facts of the case, or what the truth is, weighed in the scales of justice, the law gives to the jury to hold, when testimony is in uncertain piles on the one side and the other.

It is true that it rests with the presiding judge to review this verdict, and on the question of the weight of the evidence, heavy or slight, on the respective sides, to set aside the verdict and grant a new trial, according to his own sound discretion. It is true that, whether he grants or refuses the motion for a new trial, this reviewing court rarely interferes with his discretion; never, except when it ceases to be sound because it has been abused. But to set aside the verdict of one jury, in order that another jury may probe the case to the quick and find the true line that marks the path of the truth, is one thing; to dismiss the whole proceeding from all juries, is another and quite a different thing, to use a favorite expression of Judge Warner. To turn one out of doors is very distinct from inviting him into another room. To tell him "you can have no relief," is not the same as to say to the suitor, "the court must consult another jury as to the truth of the facts of your case, before it can decree you relief." It is not, therefore, the law that, whenever a court would set aside a verdict and grant a new trial on the facts, it may grant a non-suit. One of the earliest adjudications of this court and its very latest decision thereon known to me, is directly in the teeth of such a *dictum*.

It is true that such *dicta* appear in two opinions delivered by the lamented and esteemed Judge Crawford; the first in the case of *Burnham vs. Devaughn*, for the use, etc., 65 Ga., 311, and the other in the case of *Zettler vs. The City of Atlanta*, in the 66 Ga., 195; but an examination of both cases will show that the *dicta* are *obiter*, or at least not required by the facts in either case; and that his prudent, laborious and cautious judge reconsidered and modified these expressions, will clearly appear in his opinion in *Cook vs. The Western & Atlantic Railroad Co.*, 6 Ga., 619, where he uses this language: "It is true, it has also been held in *Tison et al. vs. Farn* 15 Ga., 493, that the court was not compelled to award a non-suit, if, after verdict, it would grant a new trial because the verdict was

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contrary to evidence, which ruling is approved by court as sound in principle and practice. In the place, the judge would not be justified in anticipating the jury would find contrary to evidence; and, in the second, there exists no right in the defendant to compel the jury, instead of the jury, to pass on the facts. He may always send them down to be inquired of by the jury, and should not fail to do so whenever the plaintiff makes a *prima facie* case."

This opinion of Judge Crawford is on the line of issue decided by the court in the 69th *Ga.*; and the cited in it from the 15th utters no uncertain sound, its voice was heard and approved in the 69th. In the 1st Chief Justice Lumpkin said: "Nor do we recognize a rule that if, after verdict, the court would grant a new trial because the verdict was contrary to evidence, it is bound to award a non-suit, on motion before trial. Such a doctrine would be an unwarrantable encroachment upon the province of the jury."

And such, it seems to us, would be the effect of such a doctrine. It would not only encroach upon the province of the jury unwarrantably, but it would make the jury wholly ineffectual and inoperative, at the will of the presiding judge. In his discretion, he may grant or refuse a new trial, where the verdict is against the weight of evidence; if, therefore, wherever he may grant a new trial, he may non-suit at law, or dismiss in equity, he may non-suit or dismiss wherever the facts, as he interprets them, make a case unsatisfactory to himself.

The better rule, it strikes us, so far as it may be generalized, would be, wherever there is conflict in the testimony on all the controlling points in the case, though the judge, after verdict, may grant a new trial, he cannot, before verdict, non-suit or dismiss.

2. So far from the rule in this state being less strict in equity cases in having facts passed upon by juries, whenever the truth of the facts is in dispute, than at law, it

statute is imperative that the final decision thereon shall be by a jury. Even where an auditor is appointed to settle accounts in equity, "the final decision upon the facts shall be by a special jury." Code, §3097. So, too, when the masters in chancery adjudicate and settle facts *prima facie*, on exception to any portion of the report, it is the jury which must return a verdict on each exception of fact, before final decree. Code, §§4202, 4203. So, more broadly yet, it is declared that "when any question of fact is involved, the same shall be decided by a special jury." Code, §4206. So where the court of equity may act at chambers, it is where facts are not in dispute or the parties consent that the judge may pass upon them, under the act of 1866. Code, §4214. And so new trials may be granted from verdicts of juries in equity cases in like manner as in cases at law. Code, §4211. But no appeal is allowed from such a verdict. *Ib.* §4211.

Of course, the Georgia equity jurisprudence differs from the English and from most, if not all, of the American states; and it may be that the mother country and the other states have the better rule; no juries except when the chancellor sees fit to send down an issue of fact to the common law court; but ours has worked well for a very long time, and whether this statutory provision be wise or not, it is our duty to see that it be preserved until repealed or modified.

3. So far as the province of the jury to try facts in dispute be concerned, it is immaterial what degree or *quantum* or certainty of evidence may be necessary by law to give relief in the case in equity. It is for the jury to find the facts, under the charge of the court, in one form or another of jury trial. If a general verdict be found, it will be because the *quantum* or certainty of the evidence, under the rule given, is sufficient, under the charge; if, by special facts in answer to questions, the court will only decree where those facts are enough to authorize the decree; and in either case, the judge may award a new trial. So that,

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at last, the true equity on the true facts is reached. By the process which our law requires—facts for the jury, law for the judge.

The reason on which jury trial on facts has always rested is, that the men of the vicinage will know more of the locality and surroundings ordinarily than the judge, on trials concerning real estate; and on all trials of fact, involving the character and truthfulness of witnesses—usually persons in the neighborhood of the contention, and thus neighbors of the jurors—the jurors will be enabled more certainly to reach the true facts of the case and make a better verdict than a judge, who is usually a stranger to the locality as well as to the witnesses. The sense of the jury system of the trial of facts cannot be better illustrated than by reference to the pending case. The eight-foot alley; the ten feet alley; the streets into which the alleys open; the lot of complainant; the surrounding locality—the entire locality is of great importance, in order to ascertain the true nature of the claim of complainant and the defence of defendant. Hence, the record is full of plats whereby this locality with its environs is transferred to paper, in order to present to the eye a picture of the scene of contest. But just as no photograph is as exactly correct as the reality it reflects, so the most accurate map or plat cannot fix in the mind's eye a locality as the eye receives it, when its own retina reflects for itself the real place. And so to catch the intent of the witnesses, what they mean in talking about the lines, boundaries, alleys and streets, an eye familiar with the spot will be better prepared than one which never rested upon it. It may be that, in this particular case, this individual, now occupying the circuit bench, being resident in Atlanta himself, may grasp the facts as easily and accurately as the jury; but legal principles must be general, so as to fit the generality of cases, and generally the judge knows nothing of the *locus* of the contention, and as little of the sworn witnesses.

Applying these principles to the facts disclosed by record, it is clear to us that the plaintiff in error was misled, by the law of this state and the long usage of her courts, to have the jury pass upon her case on the facts, so to give to the chancellor those facts as they really exist, that he may apply to them the principles of equity and make an equitable decree thereon. True, she is seeking to reform a deed, and she must make a clear case to authorize that reformation; but the jury is the body whose province it is to find the facts, to weigh them, and ascertain the degree of clearness and force which they give to her case. True, also, she may be estopped by her conduct and *laches* in respect to defendant's expenditure of money and labor on the line it claims, if, with full knowledge thereof, she saw it go on and gave a silent acquiescence to what was done on the land she sold the company; but it is for the jury to say what the company did upon the land, to what extent she had knowledge of it, and acquiesced by silence or otherwise therein. It is true again, that if she knew that the company's object was to straighten its line and square its lot, and it was actually building on the part of its line which ran along its own lot and which could not be made straight except it excluded her theory of the eight-foot alley when it reached the lot, a part of which she was about to sell the company, these circumstances should be weighed against her, and if she made no timely complaint, the weight would be heavier; but if, by the plats furnished her, she was deceived, and believed and had reason to believe, that the eight-foot alley was preserved to her by the deed and plat annexed to it or furnished to her pending the negotiation, and she signed the deed thinking that alley was secured to her, these would be circumstances to be weighed in her favor; but it is the province of the jury to weigh them all and find the truth. Moreover, if she complained quickly; if the agents of the company recognized her complaint; if those, or any of them, who negotiated the purchase for the company recognized

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that there was some ground for her dissatisfaction and disappointment about the deed, and sought to appease her or satisfy her touching the complaint she was making, then this would be entitled to what weight the jury would give it, as directly or inferentially pointing to the truth of a mistake in the deed mutually entertained, or a mistake on her part about the deed, brought about by the maps so furnished her by those agents.

Thus it is for the jury to extract from all the facts and circumstances, the deeds and words of the deeds, the plats attached to them and others, if any, furnished the complainant pending the negotiation, the conduct of the complainant and defendant's agents during the negotiation and after the sale; from these and all fair and reasonable deductions from them to extract the truth, and that degree of clearness with which they see that truth, so that the court may apply the principles upon which equity will reform this deed, or deny relief thereon.

It must be borne in mind that, in this opinion on judgment of dismissal by the court below, this court does not mean to determine or intimate what the jury should decide or what conclusion they should reach. We simply mean to decide that the complainant made such a case entitled her to have the jury—the tribunal to pass upon the facts when contested, in all equity cases, under the peculiar equity jurisprudence of Georgia—pass upon that case, and find, in either mode of jury trial the chancellor may adopt, the truth as to facts in the case, and bring to him a verdict thereon.

Purposely we omit to particularize the deeds which may bear on one or the other side, and the language in them touching this alley, lest our dealing with them might make us appear to usurp the functions of the tribunal to try facts while we reverse, with great respect for his ability and learning, the presiding judge for having, in our judgment erred, however rightfully and honestly in his own judgment.

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he acted, in granting the motion to take the case that tribunal.

gment reversed.

ed for plaintiff in error: 5 *Ga.*, 172; 11 *Id.*, 180; 15
91; 25 *Id.*, 540; 35 *Id.*, 132; 37 *Id.*, 26; 42 *Id.*, 55;
1, 395, 323; 55 *Id.*, 122; 53 *Id.*, 294, 643; 57 *Id.*, 28;
1, 595; 61 *Id.*, 38; 63 *Id.*, 488, 772, 785; 65 *Id.*, 309;
1, 569, 573; 67 *Id.*, 477, 58, 61, 430, 53.
r defendant: Code, §§3123, 3124; 13 *Ga.*, 89; 42 *Id.*,
156; 40 *Id.*, 205; 65 *Id.*, 311.

PARTEE vs. THE GEORGIA RAILROAD.

gulations of the railroad commissioners, fixing the rates of
for passengers who obtain tickets from the agents of the
panies at their depots, as well as for those who do not, and
cribing the manner in which ticket offices shall be kept open
re and at the arrival of trains, do not apply to freight trains,
only to regular passenger trains.

ough a charge may be erroneous, the party in whose favor it
ven has no right to a reversal on account of it.

ie evidence above shows nothing to establish the unreason-
ness of the regulation, nor is it unlawful.

19, 1884.

roads. Railroad Commission. Practice in Supreme
Before Judge LAWSON. Morgan Superior Court.
mber Term, 1883.

M. Partee brought an action for damages against the
ia Railroad, alleging that he had tendered his fare
proper rate, but more had been demanded by the
ctor, and he had been ejected from the train.
the trial, the evidence showed, in brief, as follows:
e desired to come from Rutledge to Atlanta, on the
train. He failed to reach the station in time for the
ager train. The next train which passed Rutledge,

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going to Atlanta, was a through freight train, which passed about three o'clock A. M. On arriving at the depot about one and one-half o'clock, he found the ticket office closed. He went to the house of the ticket agent, and told him he wanted to buy a ticket to Atlanta; the agent replied that he could not get one. When the train reached the station, plaintiff and another passenger went into the cab, and took seats in a place where passengers usually rode. The conductor asked them where they were going, and they told him to Atlanta. After the train started, the conductor came to collect fare. Plaintiff tendered his fare, at the rate of three cents per mile; the conductor required four cents per mile, and showed a rule-book in which conductors were required to charge four cents per mile to passengers without tickets. Plaintiff still refused to pay that rate, the train was thereupon stopped, and plaintiff got off. (The evidence for the plaintiff was to the effect that the conductor required him to get off; while the evidence for the defendant was that plaintiff said he would not pay four cents per mile, and if witness would stop the train, would get off, which was done.) The other passenger had a ticket, and went on. Plaintiff walked back about a mile to the station, and took the next passenger train, which went by about sunrise. The ticket office was still not open, but the conductor collected from plaintiff only three cents per mile to the next station where he could procure a ticket. Freight trains have seats for passengers, and conductors on this road never refuse them, if they are going to a point where the train stops. Tickets cost the same on both freight and passenger trains, and the same rules of the company govern as to passengers.

The following extracts from the regulations of the railroad commission were introduced :

“ Passenger Class A includes the following: Those portions of the Georgia Railroad between Augusta and Atlanta. On and after February 1, 1881, the passenger rates shall not exceed, for any one passenger, with 100 pounds of baggage, on railroads in Class A, three cents per mile.

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The regulations of railroads as to passengers without tickets
 ers of police, with which the commissioners will only interfere
 mplaint of abuse. An extra charge of more than one cent a
 ll rate, or one-half cent, half rate, is regarded as excessive,
 uch extra charge would fall below the minimum above given.
 dard Passenger Tariff.—For a passenger, with baggage not
 ng 100 pounds, the rates per mile shall not exceed the follow-
 : For passengers twelve years old and over, on roads in Class
 ts per mile. No more than these rates for passengers shall
 ged, when the ticket office shall not have been open for a
 ole time before the departure of a train from a station.”

following extracts from the rule-book of the road,
 the head of “Instruction to Conductors,” were in-
 ed:

rom all passengers not presenting tickets, or other proper
 e of their being entitled to passage, conductors will, in every
 arge the full amount, as given under the head of train rates.
 The attention of agents and conductors is especially called
 llowing rule of the railroad commissioners, which must be
 adhered to: No more than the lowest rate specified shall be
 , when the ticket office shall not have been open for a reason-
 e before the departure of a train from a station.”

jury found for the plaintiff \$16.50. He move^d for
 trial, which was refused, and he excepted.

. FOSTER; H. T. & H. G. LEWIS, for plaintiff in error.

. CUMMING; BILLUPS & HARDEMAN, for defendant.

Justice.

only question which we deem it essential to con-
 in this case is, whether the regulations promulgated
 railroad commissioners, fixing the rates of fare for
 gers who obtain tickets from the agents of the com-
 at their depots, as well as for those who neglect to
 themselves with such tickets, and prescribing the
 : in which ticket offices shall be kept open before
 the arrival of trains, so as to afford those who intend
 passage an opportunity of procuring tickets, are

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applicable to such as take passage on freight trains. The court below was of opinion that they did. In this, we think there was error. But the error was against the defendant, and it makes no complaint on that score, and, although the defendant would have been entitled to a new trial, yet if it chooses to acquiesce in the finding, the plaintiff cannot be heard to complain of a ruling that inured to his benefit. 27 Ga., 358. The regulations in question apply, *ex vi termini*, as well as by the subject-matter exclusively to rates of fare, as it seems to us, on regular passenger, and not on freight trains.

The carrying of passengers on freight trains, is not compulsory upon the company, either by law or by any rule of the railroad commission, to which our attention has been called. These several trains are run for distinct and different purposes; the one for the transportation of freight; the other for the transportation of passengers. From what is said, and from what appears to the contrary, it would seem to be the policy of both of the companies and the commission, to keep these branches of transportation distinct, and whether this policy be right and prudent or otherwise, it is not for courts to determine. Is the regulation reasonable and in accordance with law? If so, that is an end of the matter. The evidence shows nothing against its reasonableness, and nothing occurs to us why it is not lawful.

There are other questions in the case upon which it would be superfluous to pass. We express no opinion as to other portions of the judge's charge, or as to his rulings upon the admission of testimony. If they be erroneous, as alleged, they did no injury to the plaintiff, who gets as much as, or perhaps more, by this verdict (\$16.50) than he appears to be entitled to.

Judgment affirmed.

Hartley *et al.* vs. Colquitt, governor

HARTLEY *et al.* vs. COLQUITT, governor.

[Blandford, Justice, not presiding.]

It is *res adjudicata* in this case that the arrest of a defendant who is under bail, upon a different charge, and the immediate giving of a second bond by him, with new securities, to answer the second charge, does not discharge the sureties on the first bond.

(a.) It does not matter that the sureties on the second bond advised the principal to flee the country.

(b.) This case differs from 27 Ga., 311; 51 *Id.*, 158; 58 *Id.*, 341.

March 4, 1884.

Criminal Law. Bonds. Principal and Surety. Before Judge WILLIS. Taylor Superior Court. October Adjourned Term, 1883.

This was a *scire facias* to forfeit a criminal recognizance. In answer to the rule *nisi*, the sureties set up the following facts: A. N. West was arrested on a warrant for assault with intent to murder, and Hartley, Hines and Bateman became the sureties on his bond for \$200.00 for his appearance at the October term, 1882, of Taylor superior court. After he gave this bond, he was again arrested on another warrant by the sheriff of Taylor county, and for another offense, was bound over therefor, and gave a bond for his appearance at the same term of the court, with James West, his brother, and J. W. Souter, his father-in-law, as sureties, who thereupon took him in their charge, and advised, directed and commanded him to flee the country, and leave his bondsmen to their rights under the law, which he did. And further, after these defendants became the sureties of West, the sheriff of the county, by virtue of the warrant above stated, arrested West and took him out of their custody and into his own custody.

The rule was made absolute, and defendants excepted.

W. S. WALLACE & SON, for plaintiffs in error.

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THOS. W. GRIMES, solicitor general, by W. A. LITTLE, for defendant.

JACKSON, Chief Justice.

This case was decided at the last term, and the principle then ruled covers it now.* It is true that the cause now shown adds that the sureties on the second criminal charge advised and directed the defendant to flee the country; but that fact, while it makes them more guilty of violating law, and responsible on their own recognizance, does not release these plaintiffs in error as sureties on another recognizance for a different offense. Nor does it matter that the sheriff arrested defendant on a different charge while in their custody as bail under this charge. In contemplation of law, the defendant is always, from the date of the bond, in the custody of his bail, but the bond binds them to produce him for trial. If at the time of the arrest on the last charge, if done in their presence, as their answer to the rule intimates, they had notified the sheriff that they then and there delivered him and were responsible no longer on the case in which they were his sureties, then the sheriff would have required other sureties on this charge or put the principal in jail and these plaintiffs in error would have been discharged but this was not done, and the naked question decided fore remains, does the arrest of the principal on a different charge by the sheriff release his sureties for appearing to answer the first charge?

That is *res adjudicata*, and must stand as the law of the case. The cases in 27 Ga., 311; 51 *Id.*, 158, and 58 Ga., 341, do not touch this.

Judgment affirmed.

*See West *et al.* vs. Colquitt, governor, 71 Ga., 559.

Board of Education of Glynn County vs. The Mayor, etc., of Brunswick et al.

**BOARD OF EDUCATION OF GLYNN COUNTY vs. THE MAYOR,
ETC., OF BRUNSWICK *et al.***

Comity to a co-ordinate department of the government requires of courts that cases shall not be disposed of on constitutional grounds, when it is possible to avoid such questions, without a sacrifice of the rights of parties.

This court has no jurisdiction to review judgments of lower courts, unless the judgment complained of, together with the error alleged therein, shall be plainly specified.

Under the act of 1873, the powers of the board of education are not more restricted in the distribution of the fund derived from what was formerly the endowment of the Glynn County Academy than other funds entrusted to their care and management. The fund received from such sources goes into, and forms a part of, the general educational fund of the county, and is not required to be kept separate and distinct, or to be apportioned by a different rule.

The legislature changed its system of public education in Glynn county, and in consequence thereof, has made a different appropriation of the fund from that which formerly prevailed, and has called into existence a new agency, which it has invested with such powers as were deemed appropriate to carry into effect the object had in view.

That the academy is a school of higher grade than other public schools of the county makes no difference. The board of education is invested with power to establish schools of higher grade. The mayor and council of Brunswick and certain citizens of the town have no right to interfere, either as a corporation or as citizens of the county, with the management of the board of education. It is responsible to the public authorities for its management of the trust confided to its care.

April 15, 1884.

Comity. Constitutional Law. Practice in Supreme Court. Education. Glynn County. Before Judge MERRITT. Glynn Superior Court. May Term, 1883.

Reported in the decision.

HOODYEAR & KAY, for plaintiffs in error.

LARRIS & SMITH; BOLLING WHITFIELD, for defendants.

The Board of Education of Glynn County vs. The Mayor, etc., of Brunswick and

HALL, Justice.

The Board of Education of Glynn county was perpetually enjoined, by the decree rendered on a bill exhibited and prosecuted at the suit of the mayor and council of the city of Brunswick and certain citizens, residents of said municipality, from distributing among the various schools of the county any portion of the income arising from what was once the exclusive endowment of the Glynn County Academy, located in that city. Looking alone to the statements contained in the record, we should be at a loss to find reasons to sustain this decree, as we are satisfied, from a careful scrutiny of the several acts of the legislature creating this board and defining its powers and duties, that its action in this respect was warranted by the provisions of such law. The endowment of this academy, even from colonial days, seems to have been exclusively from the public treasury. Much of the fund had been lost or squandered, and the school had ceased to be maintained, when the act creating the board of education for the county was passed, and effort was made to augment what remained of the endowment by supplementing it with the county's quota from the fund provided by the state for the support of common schools.

1. It was insisted in argument by the complainants the bill, that the endowment of the academy by the state was a contract between the public authorities and the citizens of Brunswick, who were attracted to that city, and became residents thereof by reason of the educational advantages thus offered; that such citizens acquired vested rights in this alleged contract, and that an act of the general assembly, making another and different disposition of any portion of the academy endowment, divested their rights to the extent of this diversion, and thereby impaired the obligation of the contract. We do not know that the presiding judge was at all influenced by this view, and are not inclined to attribute it to him. Comity to a co-ordinating

Board of Education of Glynn County vs. The Mayor, etc., of Brunswick et al

Department of the government requires, according to any decisions of this and other courts, that causes shall be disposed of upon constitutional grounds when it is possible to avoid such questions, without a sacrifice of the rights of parties; besides, this court has no jurisdiction to review judgments of lower courts, unless the judgment complained of, together with the alleged error therein, shall be plainly specified. So that we do not pass upon a point, which, to say the least, appears to have the merit of novelty or originality, if no other, if either of these shall be deemed meritorious.

It was contended here with earnestness and plausibility, and not without considerable force, that the disposition made of the academy fund was not in accordance with the provisions of the act creating this board, entitled "an act to regulate public instruction in the county of Glynn; approved February 21, 1873," (Acts, p. 262), the first section of which makes the board consist of the mayor of Brunswick, together with three fit and competent persons, freeholders and citizens of Brunswick, to be appointed for their respective terms of office by the mayor and council of said city, and one member to be appointed by the grand jury of Glynn county for each of the 1st, 26th and 27th militia districts; and by §16 of the act, the board of education is required to report annually to the grand jury of the county, at the fall term of the superior court, its financial transactions, with all schools established or aided within the county outside of the limits of the city, and to make an exhibit, if required, of all its records, books and papers, and also to make a like exhibit and report to the mayor and council of the city, when they shall so require, concerning all schools established or aided within the limits of the city, p. 262. By §2 of the act, p. 262, the board of education is made a body politic and corporate, with certain specified powers and duties, and among others they are invested in their corporate capacity with the title, care and custody of all school houses,

The Board of Education of Glynn County vs. The Mayor, etc., of Brunswick et al.

sites, school libraries, apparatus or other property belonging to the educational department as then organized, or thereafter to be organized, with all power to control, lease, sell or convey the same in such manner as they might think would best subserve the interest of education; also, with the title, care and custody of all property, funds, securities, books and papers belonging to the Glynn County Academy, to hold, invest and dispose of the proceeds from the same as provided by law; and the existing board of trustees of said academy were thereby authorized and instructed to turn over to said county board of education, so soon as the same was organized under the act, all titles to property, funds, securities, books, etc., thereto belonging.

The only question made under this legislation is, whether, by the terms of the act, the powers of the board of education are more restricted in the distribution of the funds derived from the academy than of others entrusted to their care and management. Whether this particular fund goes into the county, or is to be kept separate and distinct therefrom, and is to be apportioned by a different rule? Whether while the city of Brunswick can participate in the other funds proportionately with the rest of the county, it is entitled to the exclusive benefit of this academy fund? There is no provision of the act which, in express terms, justifies any such separation of this from the general educational fund, or directs the exclusive appropriation of the same as contended, and it would be going very far to imply this duty from differences of phraseology in vesting the board with the custody, control and disposition of the several funds; it is true that they have the power to control, lease, sell or convey the one in such manner as they shall think will best subserve the interests of education while they are required to hold, invest and dispose of proceeds of the academy fund as provided by law. If there is any special law requiring it to be disposed of in any particular manner, our attention has not been called

Board of Education of Glynn County vs. The Mayor, etc., of Brunswick *et al.*

It; certainly the act of the 22d of December, 1857, giving the trustees of Glynn County Academy power to lease or to sell and convey the academy buildings, situate in the old town of Brunswick, together with any of the real estate which has been assigned or dedicated to said institution, etc., by the legislature, and requiring the proceeds to be held for the benefit of the academy (Acts, p. 138), does not have no such effect. Up to 1872, the public educational interests of the county seem to have been confided to the trustees of Glynn County Academy; in that year, however, as concerns the city of Brunswick, this power was transferred to the mayor and council thereof, which was authorized to lease a portion of the city commons for terms not exceeding ninety-nine years, and were required to appropriate all the revenue derived from the rents or taxes on the town commons (not including improvements thereon) for the support of such free public schools in the city as they might deem expedient and proper. §42, Act of 1872, pp. 166, 167, incorporating Brunswick. The power on this whole subject was transferred, as we have seen, in 1873 to another and different agency, in which the mayor and council of Brunswick have a voice both in creating and in controlling it, for they have a majority of the members of the board.

The legislature, as it had a right to do, has simply changed its system of public education in that county, and in consequence thereof has made a different appropriation of the fund from that which formerly prevailed, and has called into existence a new agency, which it has invested with such powers as were deemed appropriate to carry into effect the object it had in view. 22 *Ga.*, 506. The whole history of the Glynn County Academy shows that it was designed to afford free education to the children and youth of the county, and was not for the exclusive benefit of those residing within the limits of the city of Brunswick; it is not and never was a private or corporate, but a public eleemosynary establishment; and this

The Board of Education of Glynn County vs The Mayor, etc., of Brunswick ~~et al.~~

injunction, in attempting to localize it and draw to its support an undue proportion of the educational fund of the county, is in conflict with the legislative will, as expressed in various acts upon the subject. There is no weight in the objection that it is a school of higher grade than other public schools of the county, and could not therefore have been intended to be placed on a footing with them. The 11th section of the act of 1873 gives authority to the board of education to establish schools of higher grade than common schools at such points in the county as the interests and convenience of the people may require, and when so established, such schools are placed under the special management of the board at large, which has power to provide school houses, employ and pay teachers out of the general educational fund entrusted to them. Nor is there any in the objection that the academy fund is to be administered in pursuance of law, while the general fund is to be disposed of according to the discretion of the board.

This discretion, we take it, is to be used in conformity to law, as is evident from various sections of the prescribing the duties and responsibilities of the board and especially those requiring it to report its acting doings, not only to the grand jury and city authorities, to the state school commissioner.

This injunction is set aside.

The parties prosecuting this suit have no right to interfere, either as a corporation or as citizens of the county with the management of the board of education. It is responsible to the public authorities for its management of the trust confided to its care.

Judgment reversed.

CADE, trustee, vs. HATCHER *et al.*

CADE, trustee, vs. HATCHER *et al.*

[Blandford, Justice being disqualified, did not preside in this case.]

Leading questions are generally allowed only in cross-examinations, but the court may exercise a discretion in granting that right to the party calling the witness, and in refusing it to the opposite party, when, from the conduct of the witness, justice requires it; and this discretion will not be controlled, except in an extreme case, although the witness called may be one of the opposite parties to the case.

While, in this case, the court in terms refused the privilege of asking leading questions of the witness, yet it appeared that many such questions were, in fact, asked and answered without objection.

Leading questions may be propounded in a bill for discovery.

Where discovery is sought and had by bill in equity, if the complainant afterwards places the defendant on the stand as a witness, *semble*, that he does so on the same terms and subject to the same conditions as in the case of indifferent parties.

The answer of one defendant is evidence for another only when it states facts against his own interest, and in favor of that of his co-defendant. Generally, it is not evidence against his co-defendant.

Where the defendant to a bill introduces no testimony, he has the right to open and conclude the argument.

On the trial of a bill praying discovery, the defendants were not compelled to offer their answer in evidence in order to rely upon it. When discovery was had according to the prayer, defendant became complainant's witness.

The fact that counsel for the defendants announced that they considered the answer in evidence, amounted only to a statement that they would rely upon such answer, and did not take away the right to open and conclude.

The *gravamen* of a bill being that the estate of a decedent had been divided, with a view to dissipate and conceal the widow's interest by distributing it among her children, and thereby to defeat the collection of complainant's claim against her, when it appeared that the widow had received, as part of her share, an interest in a debt on one of the distributees, or a debt on a firm of which he was a member, no recovery could be had in favor of the complainant against him on account of such indebtedness, without pleadings for that purpose, and without giving him an opportunity to defend such a claim; and such matter does not appear to have been pertinent to the issue.

March 11, 1884.

Cade, trustee, vs. Hatcher et al.

Practice in Superior Court. Equity. Witness. Recovery. Pleadings. Before Judge WILLIS. Musc Superior Court. November Adjourned Term, 1882.

Cade, trustee, filed his bill against B. T. Hatcher, S Hatcher, Susan A. McMichael, formerly Hatcher, Payt Hunt, formerly Hatcher, and Marshall J. Hatcher, al ing, in brief, as follows: Samuel J. Hatcher died in 1 leaving a will, by which he devised the whole of his es to the defendants and his wife, Mrs. Elizabeth Hatc and appointed the latter as his executrix. In 1871, c complainant obtained a judgment against Mrs. Elizab Hatcher for \$1,438.73, besides interest. This judgm was against Mrs Elizabeth Hatcher, Seaborn McMich and James McMichael; but the latter two were insolve became bankrupts, and were discharged. At the time the death of S. J. Hatcher, he left a large estate, and af the losses caused by the war, the share of each distribu was about \$10,000.00. Defendants combined with M Hatcher to hinder, delay and defraud complainant, and defeat the collection of his debt, and for that purpose th had a pretended division of the estate. But though M Hatcher was entitled to one-sixth interest, they on divided the estate into five shares, and each of the defen ants took a share, with some secret understanding th they were to support Mrs. Hatcher during her life. Su subsequently, Mrs. Hatcher died intestate, leaving no propert. There has been no administration, but save for the wrongf practices of defendants, she would have left an estate from \$15,000.00 to \$20,000.00. Defendants took posse sion of all the property left by her husband after the de to complainant had been incurred. Complainant cause an execution to issue on his judgment, and it was levie on certain property which had belonged to S. J. Hatch at the time of his death, but a claim was interposed by B. Hatcher and Mrs. Hunt, which was finally tried at t April term of court, 1881, when complainant learn

Cade, trustee, vs. Hatcher et al.

from the testimony, then given, the facts on which this bill is predicated. The prayer was for discovery; that the defendants be required to contribute to the payment of complainant's debt, and for subpoena and general relief.

S. B. Hatcher, B. T. Hatcher and Mrs. McMichael pleaded that garnishments had been served upon them to answer what they owed Mrs. Hatcher; that they had answered nothing; that this answer had been traversed, and on the trial, the garnishments were dismissed by complainant; and defendants insist that this judgment bars the present bill.

The defendants also pleaded the statute of limitations, alleging that the estate of S. J. Hatcher was divided in 1868, and since that time, each distributee has been in possession of his or her distributive share; that at the time of the division, complainant's note was not due, and its existence was unknown to defendants; nor was there any suit or judgment, and judgment was not obtained until April, 1871; that the note was given by McMichael & Company, composed of S. W. and James M. McMichael and Robert Jones, and was signed by Mrs. Hatcher as security; that pending suit on the note, Jones died, and complainant dismissed the case as to him, though he left an estate fully able to pay the debt, and a verdict was taken against the McMichaels and Mrs. Hatcher; that the McMichaels were solvent at that time, and did not become insolvent until 1875, but complainant nevertheless caused the execution based on the suit to be levied on this property, to which S. B. Hatcher and Mrs. Hunt interposed a claim; that complainant dismissed his levy, and again levied in 1872, and another claim was interposed; that his claim was tried in 1875, 1878 and 1881, and on each trial the evidence showed the entire division of the estate and the share received by each distributee, and complainant knew all of these facts, and is now barred by his own act in filing this bill.

The answer of defendants denied all fraud, collusion or

Cade, trustee, vs. Hatcher et al.

effort to defeat complainant's debt, and alleged that a fair and full division of the estate of S. J. Hatcher had been made; that Mrs. Hatcher had received a one-sixth interest, which she took in the shape of two claims, one on McMichael & Company for \$2,500.00, which had previously been loaned to them, and which she considered good and solvent paper, but which subsequently became insolvent; the other, an interest in claim on the firm of Redd & Hatcher, of which M. J. Hatcher was a partner; that Mrs. Hatcher, as executrix, had loaned to Redd & Hatcher a considerable sum of money, amounting to about \$17,000.00, which was considered a good and solvent claim; that M. J. Hatcher's share in the estate was allowed to him out of this claim, and the balance was taken as part of her share by Mrs. Hatcher; that the remainder of her share was paid to her in money, but from business losses she failed to collect this debt, and from this and her own personal expenses, etc., her share in the estate was lost and absorbed. Defendants deny any sort of agreement to support Mrs. Hatcher for life, but assert that what they did was only through filial regard for her. The remainder of the answer need not be set out; nor is it necessary to detail the evidence.

The jury found that the division was in good faith, and that Mrs. Hatcher received as her share \$2,500.00 in the shape of a note on McMichael & Company, one note on William Redd, Jr., and M. J. Hatcher, and some money; that Mrs. Hatcher left nothing visible at her death, and that the defendants received nothing from her estate, and that the complainant or his attorney first knew of the division of the Hatcher estate in 1872.

Complainant excepted, and assigned the following errors:

(1.) Because the court refused the request of complainant's counsel to be allowed to put leading questions to B. Hatcher, one of the defendants, whom complainant swore as a witness.

because the court held that counsel for defendants might to open and conclude the argument, though complainant put in the answer of defendants to the evidence. [From the report of the evidence on the bill of exceptions, it appears that at the close of testimony for complainants, his counsel said to counsel for the defendants, "You put in his evidence or not?" To which counsel for defendants replied, "I have put it in."]

because the court refused to enter a decree against J. Hatcher for the amount of complainant's claim against Hatcher.

HARRARD; PEABODY & BRANNON, for plaintiff in

LITTLE, for defendants.

Justice.

Questions are made by this record:

Did the court err in refusing to allow leading questions put to Samuel B. and Benjamin T. Hatcher, defendants in the bill, but who were sworn as the complainant's witnesses, upon their direct examination by complainant?

Was there error in refusing to allow the complainant to open and conclude the argument to the jury, when the complainant had put in no evidence, except such as was put in the answers they were required to make to the complainant's bill?

Did the court err in refusing to enter a decree against the defendant, Marshall J. Hatcher, when the jury found all the issues of fact submitted to them on the favor of all the defendants, including the said Mar-

shall J. Hatcher. Leading questions are generally allowed in cross-examination, and only in these; but the court may exercise

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a discretion in granting the right to the party calling the witness, and in refusing it to the opposite party, when, from the conduct of the witness, or other reason, justice requires it. Code, §3865. In *Hayden vs. The State*, 20 Ga., 155, after stating the general rule as above, the judge delivering the opinion declared that "the case in which this court would touch the superior court's judgment, allowing or not allowing a leading question to be asked, would be an extreme one." Leading questions may be put to a witness, who shows reluctance to answer, by the party calling him. 41 Ga., 507 (3 head-note). This is unquestioned, where the witness called is not a party to the suit; but it is urged that the rule is inapplicable, where the opposite party is made a witness. This point seems to have been ruled the other way by this court in 56 Ga., 24, 27, where it was held that the discretion of the court in refusing to allow leading questions on cross-examination would not be controlled unless abused, especially where the witness was one of the parties to the suit in whose interest questions were propounded. While in the present case the court in terms refused the privilege of asking leading questions to the witness, who was one of the opposite parties to complainant calling him, yet the record shows that many such questions were, in fact, propounded and answered without objection. But this case is, in point of fact, distinguishable from any of those above cited in two particulars: 1st. The witness called was only one of several parties, defendants to the suit, and the interests of the co-defendants, as well as those of the one testifying, were liable to be affected by this unusual mode of examination. 2d. One of the purposes of the bill was a discovery from each of the defendants. Numerous interrogatories had been propounded to them, and in answer to these, full discovery had been obtained, which, we must infer, was satisfactory, inasmuch as no exceptions were filed to any of the answers. That leading questions may be propounded

in such bills is undeniable; this is, in fact, the usual practice. Story's Eq. Plead., §§34-39, inclusive.

In England, and in some of the American states, where parties have not only been made competent, but are compelled by statute to testify in their own cases, this requirement has been held to repeal the auxiliary jurisdiction of courts of equity to compel discovery; indeed, in several of them this jurisdiction is abolished by express enactment, while in others, as in this state, it is expressly retained. 1 Pomeroy's Eq., §§93, 193, 190, 215; Code, §§3101, 3103, to 3106, inclusive; as to discovery at law, 17 Ga., 111; Code, §§3810, 3811, 3812. This legislation reserves, in express terms, "the right of cross-examination as in other cases." When, therefore, the right to this discovery is sought, as in this case, by bill, and is had, it would seem that if the party afterward places the defendant on the stand as a witness, he does so upon the same terms, and subject to the same conditions, as in cases of indifferent parties. By seeking the discovery by bill and interrogatories, he makes the defendant a witness for himself, as well as for the party propounding the interrogatories to make the discovery full. It may be otherwise, and upon principle doubtless is, where this change in the law of evidence abolishes the jurisdiction, and is, consequently, a full substitute therefor.

By express provision of the Code, §3107, the answer of one defendant is evidence for another only when it states facts against his own interest and in favor of his co-defendants. Generally, it is not evidence against his co-defendants. 13 Ga., 206; 26 Id., 537; 32 Id., 418, 219.

2. Where the defendant to the bill introduces no testimony, it is his right, under the law, to open and conclude argument to the jury. *Guess et al. vs. Stone Mt. G. R. R. Co.*, decided at this term. The defendants were compelled to offer their answer, in order to rely upon it as evidence in their favor. The tender made in this instance amounted to nothing more than a notification to the opposite counsel that they should treat it as testimony.

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and was wholly unnecessary. When discovery is had according to the prayer, the defendant becomes the complainant's witness, and he cannot "turn his back" on the testimony. 57 Ga., 583; 2 Story Eq. Jur., §1528.

3. The *gravamen* of complainant's bill was, that the division of Samuel J. Hatcher's estate among his legatees was made with a view to dissipate and conceal Mrs. Hatcher's interest therein, by distributing it among her children, and thereby to defeat the collection of complainant's claim against her. This issue was submitted to the jury, and they found it in favor of the defendants. Marshall J. Hatcher received his share of the estate in a debt the executrix held against him and one Redd, who was his partner. The balance of this large debt was taken by Mrs. Hatcher in part of her share, as was also a debt upon a firm, of which her son-in-law was a member. She had a right to take both these claims as she did. It was her misfortune that she lost them. There is no phase of this bill under which an individual liability of Marshall Hatcher to his mother could have been decreed to her complainant. Such a decree would have been outside the allegations and prayers in the bill. No opportunity had ever been afforded him to show that he was not indebted to her at the time of her death or since.

The statute of limitations was pleaded to the only claim set up, and was found in favor of the defendants. The jury also found, in effect, that she left nothing to be administered by finding that she died without visible property. During the years that elapsed between the division of the testator's estate and her death, Marshall J. Hatcher may have settled with his mother his indebtedness to her, and the legal presumption is, from the lapse of time, that he did so. At all events, no decree, even if the matter had been pertinent to the issue made, and it does not appear to have been so, could have been rendered without calling on him and giving him an opportunity to be heard in relation thereto.

Judgment affirmed.

 Daniel vs Gibson

DANIEL vs. GIBSON.

[Blandford. Justice. did not preside in this case.]

e a contract specifies a rate of interest, which is not beyond
er cent which the parties may legally contract for, if a judg-
is rendered on such contract, it bears interest at the contract
and not at the rate which all contracts carry if no rate be
ated therein. This has been ruled in 69 Ga., 733, by a full
y, and two justices could not reverse it.

this an open question. under the statute law of this state, a
ent bears interest on the principal debt at the same rate as
orne by the contract upon which such judgment may be ob-
l.

doctrine of merging of the contract into the judgment, which
es a new debt of record, in the nature of a new contract,
bears the general rate of interest provided by law, in the ab-
of a stipulated rate, does not apply in Georgia.

1, 1884.

est and Usury. Judgments. Merger. Before
CLARKE. Talbot Superior Court. September Term,

February 16. 1875, W. A. Daniel gave T. N. Gibson
e, as follows: -

the twenty-fifth day of December next, I promise to pay
N. Gibson, or bearer, \$1,166.62 for value received, with
at the rate of 15 per cent from the twenty-fifth of December
not punctually paid. This February 16, 1875."

was brought on the note to the March term, 1877,
not superior court; judgment was rendered at the
ber term, 1877. for the principal sum sued for, with
t at fifteen per cent up to judgment, and costs. The
ent did not state what rate of interest it should bear.

September term, 1883, Gibson filed his petition, in
he set out these facts, and prayed that the judgment
fa. be amended so as to make the principal continue
interest at fifteen per cent after the date of the
ent. The court allowed the amendment, and de-
t excepted.

Daniel vs. Gibson.

R. M. WILLIS; W. S. WALLACE, for plaintiff in error.

J. M. MATHEWS, for defendant.

JACKSON, Chief Justice.

The sole question made by this record is this: Does a judgment bear interest at the rate specified in the contract before judgment, if that rate be not beyond the per cent which the parties may legally contract for, or does it only bear that interest which all contracts carry if there be no rate stipulated for in the contract?

At the time this contract was made, it was lawful for the parties to fix any rate of interest thereon, and fifteen per cent was agreed on. Code of 1873, §2051. Seven per cent was then, and is still, the lawful interest, if the rate be not changed by contract. Code of 1873, §2050. So that here the question is, does this judgment carry fifteen or seven per cent as its rate of interest?

1. The question is not open in this court. It was decided in *Cauthen vs. The Central Georgia Bank et al.*, reported in 69 Ga., 733. In turning to the original record of that case, of file in this court, we find that this identical point was ruled. The question was, what rate of interest did the judgment bear? And this court—a unanimous bench of three justices—held that the judgment bore the rate which the contract before judgment stipulated. Twelve justices could not, if we were inclined to do so, review and reverse that principle so decided by a full bench. Code §217.*

It will be seen that in the case in 69 Ga., 733, the rate of interest borne up judgment and that after judgment were not discussed separately by the justice who rendered the decision, but the rate of interest was held to be governed by contract. On turning to the original record, the note sued on in that case appears as follows:

"On December 15, after date, I promise to pay to the order of John Cauthen and A. Stafford three hundred dollars for value received at Central Ga. Bank, Macon. If not paid at maturity, to bear interest at the rate of 12 per cent per annum. Dated Aug. 19, 1879.

The case, on both law and facts, was submitted to the court without a jury, and the judgment rendered was as follows:

" . . . It is considered, ordered and adjudged by the court now here that the

Daniel vs. Gibson.

2. But we would not, if we could, because it is the law of this state by statute, and, of course, without regard to the decisions of other courts on the common law or law merchant, or on the statute law of other states, however high their authority, our own statute must control us.

Our Code declares that "all judgments in this state bear lawful interest upon the principal amount recovered." Code, §2054. What do the words, "lawful interest," mean? The section of the Code is codified in part from the act of 1845. Cobb's Digest, p. 393-4. The second section of that act, on page 394, declares that "any judgment hereafter rendered in any court of this state shall bear interest (so far as regards the principal debt) at the same rate as that borne by the contract upon which such judgment may be obtained." Therefore, the words, "lawful interest," in the Code mean interest at seven per cent, if the contract stipulates no other rate; but they mean the contract rate, if stipulated and within the lawful limit. In the case where no rate is agreed upon, seven per cent is the lawful interest meant by the Code; in cases where another rate is agreed upon by the contract sued on, the contract rate is the lawful interest in those cases, if not beyond the limit fixed by the statute of force when the contract was made. The act of 1845, in the first section, in effect reduced the rate from 8 to 7 per cent; and it may be that the 2d section meant to provide only for judgments on prior contracts at 8 per cent; but the principle was established that contract-interest should be followed after judgment. And really the Georgia statute is very broad.

Plaintiff, the Central Georgia Bank, do recover of T. L. Canthen and John Canthen, principals, and Alvis Stafford, endorser, the sum of two hundred and ninety-five 50-100 dollars, principal debt, the sum of eighty-three 50-100 dollars interest to this date, with interest on the principal sum from this date at the rate of twelve per cent per annum; and this judgment be entered on the minutes of the court, and a *fi. fa.* issue accordingly."

To this judgment exception was taken. There were eight assignments of error, most of them being as to matters of practice. One ground was as follows: "Because the court erred in signing up a judgment bearing twelve per cent interest until paid, the same being contrary to law and largely in excess of the rate of interest fixed by statute to cover all judgments in this State."—(REP.)

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and broadly construed, it is founded in good reason. Shall a debtor, by failure to pay when his debt is due, and having to be sued to judgment, putting the creditor to the delay and fees of attorneys to sue it to judgment, lessen the interest, when his own *laches* brought about the necessity of the costs to his creditor? The authorities on the general law rest on the idea that the judgment becomes a debt of record, a new debt, in the nature of a new contract, and hence the old contract is merged in the new, which the law makes, and that bears the interest which its maker, the general law, fixes; but the principle engrafted on our law, or our statute of 1845, makes the judgment part of the original contract, and the same contract rate of interest, the measure of damages for not paying the debt after maturity and after judgment, until paid. Whether the reason be sound, or policy wise, however, it is, in our judgment, the law of Georgia, and as such our duty is to adjudicate and enforce it.

For the general current of authority, see 24 American R. pp. 52, 367, and for our own statute law when this contract was made, see Code of 1873, §§2050, 2051; act of 19th of February, 1873. That act declares that the agreed rate of interest in "any bond, note, bill or other contract . . . shall be legal and valid to all intents and purposes, and it shall be the duty of the courts of this state to enforce such contracts," thus making, it would seem, the contract rate of interest the lawful interest in the case agreed on by contract. If "legal and valid to all intents and purposes" do not mean "lawful," what do these words mean? They carry the contract rate into every intent and purpose, and thus into the judgment, and make that rate of interest the "lawful" rate declared in §2054 of the same Code of 1873, and also in the same section of the present Code. The contract of the parties, when reduced to judgment, becomes, under our law, a contract of record (Code, §2716); and by the act of 1845, as well as that of 1873,

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supra, the contract for interest at a certain rate becomes the contract of record in the form of a judgment.

But were we wrong in all this reasoning, we could not review and reverse, 69 *Ga.*, 733,—but two of us presiding; and the principle there ruled must control here, it having been pronounced by a full court.

Judgment affirmed.

Cited for plaintiff in error, acts of 1845, p. 36; Code of 861, §§2022, 2027; Code of 1873, §2054; Code of 1882, §2050, 2054; 22 *How.*, 118; 9 *Wend.*, 471; 6 *Halsted, N.*, 113; 2 *Beasley*, 289; 3 *Blackford*, 457; 4 *Johnson, Ch.*, 36; *Law R.*, March 19, 1884, 368; *Breese*, 52.

CARLTON *et al.* vs. THE SOUTHERN MUTUAL INSURANCE COMPANY *et al.*

- Where a mutual insurance company filed a bill in equity, alleging that a large surplus fund had been accumulated by reserving certain amounts from the premiums paid in by the mutual insurers; that this surplus had become amply sufficient, and was in danger of becoming too large; that certain questions had arisen concerning it and the interest arising from it; and praying that the charter might be construed and interpreted "so that by the decree in this case the legal status of the reserve fund may be finally and definitely determined and fixed, and so that it may be ascertained and declared who are its lawful owners, and who are entitled to share in any division of the fund itself or of the income produced by it,"—such bill brought the reserved fund before the court, and cross-bills on the part of some of the defendants, setting up rights or claims as to the fund were germane to the litigation and not demurrable.
- (a.) If a cause of action arose by the filing of a bill, and is germane to it, or if it existed before, and the bill uncovers facts transpiring before it was brought, and discovers equitable rights to the defendants, they may ask relief arising from those facts by cross-bills, and need not bring a separate action.
- 2. Where a mutual insurance company filed a bill, and selected certain individuals of each class of persons interested, as representatives of such classes, on the ground that service could not be made on all the class, and the defendants entered the litigation into which they had been invited, and, through their representatives,

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- filed cross-bills setting up their rights, they were not outside parties to the litigation, and it is not just to dismiss their cross-bills, and thus turn out of court both the class whom the select men represent, and the men so selected by the company itself.
3. If the reserved fund is more than the charter, or the resolutions of the directors authorized, or than the necessities of the company and its expenses and reasonable expectation of losses require, the protest against it is clearly expressed in the cross-bills, and amply sufficient to make an equitable issue thereon.
 4. An allegation in the cross-bills that there was nothing on the books of the company to put the defendants filing such cross-bills on notice that more than ten per cent of annual profits had been reserved, and that a resolution of the directors announced that they would not go beyond that per cent on profits annually, or \$200,000 in bulk, and that such defendants had no actual notice of any sort, was sufficient, and should not have been dismissed on demurrer.
 5. When the defendants are brought into court as a class or classes, they may defend in the same manner, and if a cross-bill be a legitimate mode of defence, by asserting rights springing out of the subject-matter of the bill, and asking relief thereon, it may be filed by them as a class.
 6. A mutual insurance company is based upon the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. Without a charter, such an organization would be governed by the general law of partnership. When incorporated, they are subject to the terms of their charter. The charter stands in the place of articles of partnership, and modifies the general law as respects losses and profits where the two conflict. But except as changed by charter, equity will apply the general laws of partnership in respect to interest in and division of profits.
 7. The fundamental principle at the base of all partnerships is a division of profits or losses in some form or degree, equal or otherwise, as the terms may be; and in a mutual insurance company the idea of mutuality involves the result that each assured becomes interested in profits and liable for losses.
 8. The Southern Mutual Insurance Company, in its charter, its sence and its very name, is a mutual insurance company, and every stockholder is interested in the profits; and when the fund remaining, after paying losses and expenses, swells beyond the necessities of the corporation, and the excess becomes subject to distribution, he participates in the division. His obligation to pay losses is to the amount of premium required of him, and his privilege is to participate in the profits, when the fund reserved for the necessities of the corporation becomes larger than necessary.

9. The terms "stockholder" and "member," as used in the charter of this company are synonymous, and a stockholder, in respect to division of profits, is he who puts stock in the company in the shape of premium money (the only stock in such company consisting of premiums paid to insure property); and if what he puts in contributed to make a surplus fund of profits, whether in or out when the division is made, he remains a member to draw his share of such profits according to the amount of his premiums paid, pro rated with that paid by others, who also contributed to the accumulation.
10. The effect of paying premiums by notes or in cash discussed.
11. If the surplus over a proper reserve fund was in the coffers of the company, and it appears that it should have been divided while a member was still insured, and that the division would have allotted to him a part, equity will decree that this be done now, and will distribute it as it would have gone then.
2. The essence of mutuality is that those who contribute to produce assets are interested in proportion to their contribution, and if others manage for them as beneficiaries or *cestuis que trust*, the managers being trustees, equity will prevent misappropriation, or decree restoration, if improperly withheld.
3. By resolutions in 1855, the directors provided for a reserved fund, fixing ten per cent on profits as the annual contribution thereto, and for the remaining part of the profits scrip was to be issued annually to the policy-holders for one year, to be paid when the cash means of the company amounted to \$200,000. Whatever was not issued to a then stockholder entitled to it, he is entitled to now.
4. The act of 1856, amending the charter of this company, did not destroy its mutual character. It gave the right to reserve a fund necessary to meet emergencies, and then retained the mutuality of all stockholders in participation in profits made during their term of insurance.
- a.) The limit of \$200,000 cash, as fixing the time when the scrip should be paid, would not apply to all years. With the increase of business and the increase of risk, proportionately will the amount of cash necessary to meet that risk increase.
- b.) If the resolutions of 1855, and other similar resolutions, fixing the issuance of scrip, after deducting ten per cent, were published from year to year to invite insurance, and some of the defendants were induced thereby to insure, it would add weight to their right to hold the company to its publication and to keep the directors within the limits of the reserve which they thus fixed, and appropriate the balance to profits for stockholders.
5. The equity of those forced out without fault is greater than that of those voluntarily retiring, but in neither case would the termination of the insurance forfeit the profits previously made.

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16. No statute of limitations can apply to all of these cross-bills, many of the defendants filing them having been insured but a year or two before the bill was filed. Besides, the relation makes a sort of continuing trust, and the statute does not bar, especially until the limit is complete, after knowledge of the acts of the trustees which made the fund accessible for distribution. Knowledge or opportunity therefor is denied in these cross-bills.
17. No demand was necessary on the part of the defendants before filing the cross-bills; but from abundant caution a demand was made before the last cross-bill was filed.
18. Directions given to the court below as to the mode of ascertaining what would be a legitimate reserve, what amount would be for distribution, and how a distribution should be effected.
19. In fixing the amount of the reserved fund; regard must be had to the present, past and future, and equity will so direct as to do justice to all.

June 10, 1881.

Insurance. Corporations. Stock and Stock. Before
Judge ESTES. Clarke Superior Court. November Term
1883.

To the report contained in the decision, it is only necessary to add the following: On May 26, 1881, the Southern Mutual Insurance Company, through its directors, filed its bill in Clarke superior court against Lampkin *et al.* and Carlton *et al.*, alleging, in brief, as follows: The company was chartered by act of the legislature in 1847, and charter has been amended three times since, in 1849, 1855 and 1866. The amended charter is set out hereafter. The company was organized strictly upon the mutual plan "and upon that plan all its operations have been conducted." There are no stockholders, in the ordinary sense of the term, the policy-holders, officers and agents exercising control over the affairs of the company, and policy holders being treated as occupying a relation nearly corresponding to that of stockholders.

The principal office was first in Griffin, but in 1849 moved to Athens. At first, the company insured both life and property, but in 1855 it ceased the business of insurance.

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"From a very early period in its existence, it has been the policy of the company, as indicated in its charter, to accumulate a reserved fund which would be sufficient to furnish an ample guaranty to the holders of policies in the company. This purpose has been strictly adhered to, and a reserve gradually accumulated, which, it is reasonably certain, affords ample protection to the policy-holders against the present amount of risk. At the same time, the company have also pursued the policy of dividing among the policy-holders, in the shape of dividends, almost the whole of the annual profits arising from premiums."

In 1855, the directors adopted the following resolutions, which were ratified in the same year by the annual meeting:

"1. From and after the first day of July, 1855, the whole premium is required to be paid in cash, without discount or abatement.

"2. All holders of one-year policies shall be entitled to participate in the profits of the company, for which profits, after deducting from 5 to 10 per cent, at the discretion of the directors, for an accumulated fund, scrip shall be issued annually; provided that the first scrip issued shall be for profits from the 1st July, 1855, to the 1st September, 1856.

"3. Whenever the cash means of the company shall amount to two hundred thousand dollars over the dividend first declared, the directors shall order the payment of the first scrip issued. In like manner, subsequent issues of scrip shall be paid in their order.

"4. The profits to be divided as above are taken to be whatever may remain from the receipts of each year, after deducting all the losses of the year, whether paid or unpaid, as well as commission, salaries and other expenses."

The bill alleges that this plan was put into operation, and has since been pursued down to 1879, when certain other sums were added to these amounts derived from premiums.

"Under the operation of this policy, and carrying out these regulations," there have been annual dividends, and a reserve has also been laid up, which at present amounts to \$912,803.19, face valuation, but is invested in stocks, etc., the actual market value of which is much more. The

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interest on the reserve fund has been added to it until 1879. The total amount at risks when the bill was filed was \$17,650,728.00.

“The entire past experience of the company points out and justifies the conclusion that the present reserve fund is abundantly sufficient to afford ample protection to policy-holders against danger from that amount of risk. Unless, therefore, the amount at risk should be increased, no reason suggests itself why the reserve should be allowed to become larger than it is.”

At the annual convention in 1872, a resolution was adopted allowing the directors to increase the dividends by dividing the interest on the reserved fund, and in 1879 this was done.

“This action, it is believed, was rendered necessary, in order to prevent an accumulation of surplus funds beyond the amount contemplated by the charter, the limit being considered to be whatever amount the judgment and discretion of the directors, guided by experience, shall fix as a sufficient reserve. That point being reached, it is necessary to pay out the interest, in order to prevent the further increase of the fund.”

“With the present amount and volume of business, the reserve is large enough. The officers of the company, realizing that they hold it as trustees for the true owners, remembering that it is the result of the steady accretion of thirty years of successful business, and that the innumerable payments of all who have ever been policy-holders have all contributed, like Peter's pence, each almost imperceptibly, to swell it to its present proportion, and in view of the uncertainty as to the true intent and meaning of the charter, are unwilling to assume the responsibility of paying out any more of it, until it is judicially determined who are entitled to receive it.

“As to this, the following questions have presented themselves, which they are not able to decide:

“To whom does this reserve fund belong? Are the

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who are the holders of one-year policies at this time the owners? If so, upon what basis shall a division among them be made, or are they and all who have ever held policies the lawful owners, or are all who have held policies heretofore, since a certain date, joint owners, and those before that date excluded, and if so, what date constitutes such a bar? Your orator is advised that the income follows the *corpus*, and that, in order to ascertain who are the lawful recipients of dividends of its interest, the questions above stated, as to the ownership of the fund itself, should be determined."

The second and fourth sections of the charter are all that cast any light upon the question of stockholders, and the by-laws are silent upon the subject.

Those who have ceased to be policy-holders may be divided into two classes: (1.) Those who have ceased voluntarily; and (2) those who were cut off by the company involuntarily.

To the second class belong a large number of those who held policies in South Carolina, Florida, Alabama and Mississippi. They had regularly paid their premiums, complied with all the requirements of the company, were not in default, and desired to continue as members; but it was believed that, in view of legislation in those states, the safety and interests of the company required a withdrawal therefrom. This took place as follows: From South Carolina, in 1869; from Florida, in 1872; from Alabama, about the close of the war; from Mississippi, before the war.

"No account and settlement was had with these policy-holders at the time or since these withdrawals, and no demand or claim of any interest in any accumulation has ever been made by them."

Though empowered to insure for as long as ten years, it has long been the practice to issue no policy for a longer time than one year. Risks for a shorter time are made by what are termed "insurance receipts." It has also been

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the practice at the end of a year to extend policies by what are termed "renewal receipts." The status of these insurance and renewal receipts is also a matter of doubt.

"In the event that it should be held that the term 'stockholder,' as employed in the charter, means those only who at the time are the holders of one-year policies, and that consequently they only are entitled to receive any dividends that may be declared from the reserve fund, the question still remains, upon what basis shall it be divided among them? The expression, 'according to the respective amounts of their premiums,' is ambiguous."

On account of the large number of people in interest, all of them were not made parties defendant by the bill; but only certain selected persons, as representing various classes of present and past policy-holders.

"Your orator therefore charges that the reserve fund of this company is now large enough, and should not be increased; that its growth from its own interest alone is now so rapid that, unless checked, it will go to near a million dollars before the end of the present year; that it is reasonably certain that the time has now come, spoken of in the charter, when a division of its income at least should be made among the stockholders; that in view of the great doubts springing out of the charter and hanging over questions, who are the stockholders in this company used in the charter, who are the lawful owners of this surplus, and what persons are entitled to share in any division that may be made of this fund or its issues, and upon what basis that division should be made, what is the legal status in this company of the holders of insurance receipts and renewal receipts, and in view also of the amount involved, and the weight of responsibility resting upon the officers of this corporation, a judicial determination of all these disputed questions, and a decree giving the company direction in the premises, are imperatively demanded."

The prayers of the bill were as follows:

(1.) "That the charter of this company may be construed and

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l, so that by the decree in this case the legal status of the fund may be finally and definitely determined and fixed, it may be ascertained and declared who are its lawful owners and who are entitled to share in any division of the fund the income produced by it, and so that the term stockholders, used in the charter, may be interpreted so as to remove all uncertainty as to the true intent and meaning of that

that in the event that none others but present policy-holders are intended by the word 'stockholders,' that it may be settled once and for all upon what basis a division among them shall be

.) That the legal status of renewal and insurance be determined.

that Lampkin, Hull, Grant and Warren be made representatives of the class of present policy-

Carlton and Lowrance "may be made parties defendant representing and defending for themselves, and for all who were formerly policy-holders in this company, but are now and whose connection was terminated otherwise than by the company's act alone, so that all those aforementioned, who were policy-holders in this company, but are not now, and whose connection was terminated otherwise than by the company's act alone, as the said Carlton and Lowrance, may through them be made defendant to this bill, and bound by the decree."

), (9), (10.) That Petit and Trenholm be made representatives of the South Carolina policy-holders, and Swann, representing the Florida policy-holders, and that they be served under order of court; and that they be surviving or legally represented any policy-holders of Alabama and Mississippi, "who are decreed to have any rights in the premises," the decree and order be taken as to them.

that, in the event that it should be decreed that any of the defendants have rights to any sum or sums hereinbefore mentioned, that your Honor will appoint some suitable and proper receiver, if desired by the company, for their benefit, and that the company may pay over such sum or sums as may be decreed, so as not to interfere with the future operations of the company, who shall disburse the same subject to the order of your Honor in the decree in this case."

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as follows: The company was organized on February 5, 1848, under its charter of 1847, upon the premium note system, that is, each insurer deposited a note for the premium on his policy, paid ten per cent in cash, and was assessed, if necessary, to meet other losses and expenses. An annual report was made in 1848, and, together with the charter and by-laws, was printed for the use of members, and to induce others to insure. Each year since the an annual report, containing all of the material proceedings and facts as to its affairs, has been published for free distribution. In 1850, a by-law was adopted that "every person insured in this company for one year or more shall be considered a member thereof." This, with the amendments to the charter, was published. The stockholders had notice, and were bound by the proceedings. They attended the annual meetings, or wilfully neglected to do so, and trusted to the honesty and integrity of those present. In the charter and by-laws, the words "member" and "stockholder" have been used interchangeably to mean persons holding policies and entitled to vote. In 1855, the resolution stated in the bill was adopted, and was acted on until June 4, 1867, when it was amended by providing that, when the profits of any year should not exceed ten per cent of the premiums received, no dividends should be declared for that year, and that no scrip should be issued for less than one dollar. No member has any right or interest authorizing him to claim any part of the reserved fund, except dividends set apart to him; and for that scrip has been issued and paid, or taken for re-insurance. Policies have been issued on the faith of the fund, and insurance cheapened thereby, and each insurer undertook to leave the specified per cent of his profits in the fund. The surplus is not larger than necessary. The directors, or they and the stockholders, have so determined.

The six years' statute of limitations, the twenty years' statute, and the limitations act of 1869, were pleaded. Since 1852, only annual policies have been issued, and re-

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the new contracts. Upon the termination of each the interest of the policy-holder ceases.

The company desires to continue its business, disposing of the same as heretofore, and reserving the *corpus* of the fund, to be dealt with as its charter directs. No one holding a year-policy has any right to any of said fund, but the majority of those holding such policies can control the matter as the charter directs."

Several amendments were made to the cross-bills. As the court made, in brief, the points stated in the decision, in addition to denying any bar of the statute of limitations. The demurrer and motion to dismiss, the granting of the cross-bills by the chancellor, and his subsequent rulings, together with the verdict, decree and writ of exception, are all sufficiently set out in the decision.

JACKSON; J. H. LUMPKIN; H. H. CARLTON; E. KIN, for plaintiffs in error.

HAMMOND; POPE BARROW; L. & H. COBB; A. J. V. S. BASINGER; ALEX. S. ERWIN, for defendants.

ON, Chief Justice.

The bill for direction brought by the Southern Mutual Insurance Company, through its directors, alleging that the reserve fund had swollen to \$912,803.19, was increasing, and would soon reach a million of dollars, praying the instruction of the court in respect to the same, how it should be distributed among present policy-holders, and various classes of past policy-holders, ready for distribution, on future increase by its own accumulations from interest or otherwise, and who were owners, so as to entitle them to share in the distribution. All persons who had taken fire insurance policies, the insurance having been long abandoned, were made defendant in classes, certain individuals be-

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ing served, representing each class. One class was present policy-holders, another were residents of other states having property in those states insured, and, those states being abandoned, were dropped by the company; the other, which the company made defendants, was a class of past policy-holders. Other individuals came and were made parties, on motion; among them some whose locality in Georgia had been abandoned. The petitioners alleged and desired to be informed by the court as follows:

"Your orator, therefore, charges that the reserve fund of this company is now large enough, and should not be increased; that its growth from its own interest alone is now so rapid that, unless checked, it will go to near a million dollars before the end of the present year; that it is reasonably certain that the time has now come, spoken for in the charter, when a division of its income at least should be made among the stockholders; that in view of the grave doubts springing out of the charter and hanging over the questions, who are the stockholders in this company, as used in the charter, who are the lawful owners of this surplus, and what persons are entitled to share in a division that may be made of this fund or its issues, and upon what basis that division should be made; what is the legal status of this company of the holders of insurance receipts and renewal receipts; and in view also of the amount involved, and the weight of responsibility resting upon the officers of this corporation, a judicial determination of all these disputed questions and a decree giving the company direction in the premises, are imperatively demanded."

And in pursuance of this desire, they prayed as follows in substance:

(1.) "That the charter of this company may be construed and interpreted, so that, by the decree in this case, the legal status of the said reserve fund may be finally and definitely determined and fixed, and so that it may be ascertained and declared who are its lawful owners, and who are entitled to share in any division of the fund itself, or of the income produced by it, and so that the term stockholders, as used in the charter, may be interpreted so as to remove all doubt and uncertainty as to the true intent and meaning of that instrument.

(2.) "That in the event that none others but present policy-holders are intended by the word 'stockholders,' that it may be settled by the decree upon what basis a division among them shall be made.

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(3), (4) That the legal status of renewal and insurance receipts be determined.

(5.) That Lamplin, Hull, Grant and Warren be made parties as representatives of the class of present policy-holders.

(6.) That Carlton and Lowrance "may be made parties defendant to this bill, representing and defending for themselves, and for all others who were formerly policy-holders in this company, but are not now, and whose connection was terminated otherwise than by the company's act alone, so that all those aforementioned, who were formerly policy-holders in this company, but are not now, and whose connection was terminated otherwise than by the company's act alone, as well as the said Carlton and Lowrance, may through them be parties defendant to this bill and bound by the decree."

(7), (8), (9), (10.) That Petit and Trenholm be made parties representing the South Carolina policy-holders, and Scott and Swann, representing the Florida policy-holders; and that they be served under order of court; that if there be surviving or legally represented any former policy-holders of Alabama and Mississippi, "who shall be decreed to have any rights in the premises," the proper rule and order be taken as to them.

(11.) "That, in the event that it should be decreed that any of these parties defendants have rights to any sum or sums hereinbefore referred to, that your Honor will appoint some suitable and proper person a receiver, if desired by the company, for their benefit, to whom the company may pay over such sum or sums as may be proper, so as not to interfere with the future operations of the company, and who shall disburse the same, subject to the order of your Honor and the decree in this case.

(12), (13.) For general relief and subpoena.

The substance of which allegations and prayers is, that the directors desired to be instructed as agents and trustees, and desired, as such, to know who were interested in this fund, and after deducting therefrom such portion as was necessary reasonably to conduct the business of the Company in payment of losses which might probably arise from fire, and expenses, salaries, etc., who would be entitled to it, and how it or its issues should be distributed among these classes of persons insured by it, and who had paid premiums into its coffers. The defendants answered the bill, representing others of their class, as well as themselves, each class in its answer asserting its right to participate, and some filing cross-bills, and praying discovery

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in regard to the time within which contributions had been made to the funds not expended, and which, by accumulations and investments, had swollen into this large surplus. On demurrer to the cross-bills of defendants, those bills or answers in the nature of cross-bills, were stricken and dismissed. On the hearing before the jury, the court refused to submit these issues to the jury :

“(1.) From what sources was the accumulated surplus or reserved fund derived ?

“(2.) Was more than ten per cent of the profits of any year's business carried to the reserved fund ; if yes, for what years, and how much each year ?

“(3.) Was more than ten per cent of the gross premiums for any year carried to the reserved fund ; if yes, for what years and how much for each year ?”

In reply to the questions which were asked the jury and the issues permitted by the court, the jury found that the complainant accepted the charter of 1847, and amendments made in 1849, 1856 and 1866, that it once insured lives, but ceased in 1854 ; that it now collects its premiums in cash ; that it abandoned the note system 1st of July, 1855 ; that it held annual meetings of members ; that it has paid all dividends declared up to this time in scrip ; that it ceased to issue policies for more than one year on the 14th of February, 1852 ; that they were renewed by receipts ; that the right to cancel policies was reserved ; that it does not appear that any was so cancelled contrary to the charter, unless quitting the states of South Carolina, Florida, Alabama and Mississippi was an exception ; that it ceased doing business in South Carolina, 20th of December, 1869 ; Florida, 10th of March, 1862 ; Mississippi, 1st of February, 1862 ; Alabama, in—1862, except Mobile, 9th of March, 1862 ; that it ceased to do business in the states for the reasons stated in the bill and amendments and in the minutes in evidence as to Florida ; that the surplus, when the bill was filed, was \$912,803.19 ; and upon this verdict, the chancellor entered the following decree

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"1. That said company has the right to accumulate a reserve fund adequate to the necessities of said corporation, the amount thereof to be controlled by the directors.

"2. That the company, in its corporate capacity, is the sole owner of such reserve fund.

"3. That no member or stockholder of said company is owner of any part of said fund, or the income thereof, until the same has been set apart to him or her as a dividend; that it is optional with the company when and in what sums said dividends shall be declared.

"4. That in case such dividends are declared, none will be entitled to any part thereof but the members or stockholders of said company, at the dates of the declaration of such dividends respectively; that members and stockholders are synonymous, and none in this regard are members of said company, unless, at the time of declaration of such dividends, he or she holds a policy of insurance issued by said company for the term of one year or longer, but a renewal receipt shall be taken and considered as a new contract, and equivalent to a policy of insurance for the term specified in such receipt.

"5. That, in fixing the shares of members in such dividends, the same shall be according to the respective amounts of their premiums paid for the policy or renewal receipt for one year or longer, and without regard to premiums paid in any former year or on any former policy.

"6. That none are entitled to any share of such dividends, by reason of having been insured by said company, but who are not insured by it for one year or more when the dividends shall be declared.

"7. That said company may, nevertheless, pass any by-law changing the length of time for which it will hereafter issue policies, or on other subjects not inconsistent with the charter and this decree."

8. As to costs and fees.

Whereupon, *Carlton et al.* excepted, and assign error as follows:

(1.) Because the court sustained the demurrer and motion to dismiss the cross-bills.

(2.) Because the court refused to allow counsel for *Carlton et al.* to go to the jury, or introduce testimony, to show the excessiveness and disproportion of the reserve fund to the necessities of the company, which they offered to do.

(3.) Because the court refused to allow counsel for *Carlton et al.* to go to the jury, or introduce testimony, to show that, from 1855 to 1883, more than ten per cent of premiums, and more than ten per cent of profits, had been carried to

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the reserve fund without their knowledge, and were held there; and to show the years in which this was done and the amount thereof.

(4.) Because the court refused to submit to the jury each of the issues which he was requested to submit, as above stated.

(5.) Because the issues submitted to the jury, and their findings thereon, were not sufficient to furnish a basis for a final decree in this case.

(6.) Because each division of the decree, numbered from one to seven, is illegal, unwarranted by the pleadings, evidence or finding of the jury, and, singly or combined, they do not constitute a legal and proper decree.

Was there error in sustaining the demurrer and dismissing the cross-bills?

The demurrer rests on the following grounds:

(1.) For want of equity.

(2.) Because the parties named sue for themselves, and others in like relation, and the others are not named.

(3.) Because the allegations of want of knowledge or notice as to the reservations made are insufficient, and there is no allegation of fraud or concealment.

(4.) Because the allegation as to protest against reservation is uncertain and insufficient.

(5.) The demand stated in the cross-bill is defective and insufficient, in that it appears upon its face to be a demand made by outsiders upon the convention of policy holders, and not action proposed for said convention by any member of it; and because it does not contain the names of claimants.

(6.) Because each cross-bill "sets up matters not germane to the bill or its amendments, and not as defences thereto, but as original causes of action against complainant and in that, so far as its prayers for relief are granted (?) upon said demand, it is apparent upon its face that it is a cause of action which has originated since the filing of the bill and amendments, if it has originated at all."

Let us examine the demurrer in the reverse order in which its grounds are stated. The sixth ground raises the question, whether the cross-bills are germane to the main bill. Of course, if not, the court below was right to sustain the demurrer on this ground.

The main bill for direction made these parties defendants to a legal proceeding to divide a fund (or its issues) held by this mutual insurance company for distribution among its policy-holders at the time of the filing, and all others who had insured in the company having rights to part thereof. The cross-bills of Carlton *et al.* allege, in substance, construing them altogether, that:

(1.) The company is strictly a mutual insurance company, the very meaning of which is, that each policy-holder looks for indemnity against loss to the payments of each of the other policy-holders, and that each has a right to share in the profits in proportion to the amount paid by him.

(2.) The charter does not provide for a surplus fund like that held, but does provide for the distribution of any amount accumulated beyond the necessities of the company; by which is meant that all the funds received shall be divided, after the payment of losses and necessary expenses for the year.

(3.) To adopt the ideas of the bill and its amendment, would place policy-holders entirely at the mercy of directors.

(4.) The resolution of 1855 was *ultra vires* and void.

(5.) If not, it limited the reserve to \$200,000.

(6.) The rule prescribed by the resolution of 1855 has not been followed, but each year more than the ten per cent allowed by that resolution has been reserved. The amounts of these excessive reservations are stated, and it is charged that such excessive reservations were knowingly, willfully and intentionally made, and that even by the directors' own mode of calculation, there has been held a large excess above the amount which could be retained under any construction of the resolution of 1855.

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(7.) "These defendants charge that they had no knowledge or notice whatever, either actual or constructive of this illegal and improper addition to the surplus fund which of right should have been divided among them and those in like circumstances with them. They never knowingly acquiesced therein, and never ratified the same or agreed thereto; but, on the contrary, they protested against the same as soon as it came to their knowledge, and have ever since objected thereto and protested against it. The defendants charge that, immediately upon discovering the aforesaid facts, to-wit: on June 5, 1883, and before the filing of the last cross-bill, they made upon complainant the following demand in writing, addressing the same both to the annual meeting of the stockholders of complainant and to complainant itself.

The written demand made, in brief, the following points: First: that these demandants should be recognized as having an interest in the surplus fund and its income. Second. That there was no authority under the charter to create a surplus fund; and that, having been created, reserving part of the amounts paid in during the year in which they have been policy-holders, the illegal amount so reserved should be paid *pro rata* to the policy-holders of those years, and their share should be paid to them. Third. That the resolutions of 1855 limited the surplus to \$200,000, and that all in excess of that amount should be divided *pro rata* among the policy-holders of the year in which it was reserved, and demandants be given their share. Fourth. That the resolutions of 1855 only allowed five to ten per cent from profits to be reserved; that the directors had reserved more than that amount annually and that the excess should be paid to those from whom it was withheld, including demandants. Fifth. That if, for sound legal reasons, it is determined not to pay out at this time in money the amounts due demandants, their right should be established, and that their proportion of the income from the accumulated fund be annually paid to the

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Sixth. That neither the surplus fund nor the income thereon should be paid out until the rights of demandants should be recognized or passed upon by the courts.

These demands were met by a positive refusal. And as the defendants are threatened with a bar, unless they assert their claims in respect to the surplus fund in defence to the bill of complainant, they bring this cross-bill, in order that the entire matter may be determined in one litigation.

(8.) That the surplus is unreasonably and unnecessarily large, and not within the bounds of a reasonable discretion, and as complainant admits a want of discretion, it was prayed that a reasonable and proper limit be determined, and that all in excess of that amount be divided. Discovery was prayed, and the other prayers were in accordance with the allegations set out above.

And in addition to the foregoing, by amendment it was alleged that the company had published in annual reports and other publications, in order to induce insurance in this company, that all who insured would be interested in the profits during the term of their insurance; and that some of them were induced by these publications to become insured therein, and not only that they were ignorant of the fact that more than ten per cent had been reserved, but that nothing appeared upon the books of the company to give such notice.

1. Having filed the bill to ascertain who were legally interested in the fund, as well when increased as at its present stage, and having made these various classes parties to it, upon what principle rests the idea that these cross-bills are not germane, we cannot see. In 2 Daniell's Chancery Practice, 1548, it is said: "A cross-bill is a bill brought by a defendant against the plaintiff, and, if necessary, other parties, in another suit touching the same matter." These allegations certainly touch the same matter, the very fund in question and future accumulations, and make them germane to the original bill. The same

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author adds, that "it frequently happens that a complete decree cannot be made without a cross-bill, or cross-bills, to bring the whole matter in dispute completely before the court. In such case, it becomes necessary for some, or one of the defendants to the original bill, to file a bill against the plaintiff, and, if necessary, other defendants to that bill, or some of them, and bring the litigated point properly before the court." These cross-bills bring these points, germane to the very core of the bill, before the court. So, also, on page 1550, it is said: "Where a defendant seeks the aid of the court for the purpose of enforcing his rights, he must file a cross-bill." Here these defendants allege rights and ask the court to enforce them; therefore, the cross-bill was necessary, for the author adds, "but when he relies upon his rights, merely by way of defence to the relief sought against him, it is not necessary to do so." So, in note 2 to the same page, it is said: "In general, the defendant cannot have any positive relief against the plaintiff, even on the subject matter of the suit, except by cross-bill"—citing a great many cases thereon. Here the defendants want positive relief. They want their part of this fund, if it has accumulated so as to be ready for distribution, and if equitably, they have a right to part of it, and their part of its issues. They want to know how much of it sprang from profits made while they were members of the company, and what their *pro rata* share of it is. They allege that it is too large, beyond the charter power to retain it, and beyond the resolutions adopted by the directors themselves, and beyond the necessities of the company to retain it, in order to meet probable losses in future, and ask positive relief—the most practical sort of relief—to have the money due them paid to them.

So Story lays down the same principles in his *Equity Pleading and Practice*, §§392, 391, 389, 399, notes 3 and (a). See also Mitford's *Pleading*, 81; 13 *Ga.*, 478, 481; 14 *Id.*, 167, 171; 1 *Smed. and M. Ch.*, 376, 391; 6 *Pai*

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28S; 11 Wheat., 446; 14 Blatch., 371, 373; 3 Ga., 61 *lb.*, 329, 333-5; 36 *lb.*, 333; 57 Ill., 422; 22 N. Y. 471; 15 Ala., 501, 513.

e Code makes an answer in the nature of a cross-bill as a cross-bill. §4181. So that the demurrer was not erly sustained on the ground that it is not germane. do we think that the ground is aided by stating that cause arose for relief after the original bill was filed. ose by the bill, and is germane to it; nay, it existed re; knowledge of it may have come to defendants : the bill was filed. But for the allegations of the bill, ay not have been known or a suit been instituted; if the bill uncovers facts transpiring before it was ght, and discovers equitable rights to the defendants, should they not ask relief arising from those facts? they bring a separate suit in such a case? Equity nothing by halves, but gives complete relief. He seeks it must do it. Code, §§3084, 3085; 14 Ga., 323; *id.*, 332. And he must do it, we think those cases in the very case in which he himself seeks it, if the re-ought by the defendants be akin to the subject in d to which he seeks relief for himself.

The fifth ground is equally indefensible. How are efendants outside parties to a litigation into which ave been invited; and when they come in as classes, ented by certain individuals of each class, selected mplainant, for the reason that service could not be on all the class, is it just to dismiss their cross-bill, ht by the select men the company itself served for the class, and thus turn out of doors, not only the they represent, but the select men who were served e company?

So also, in respect to the fourth ground, it appears to they should prove what they allege, that the reserve is more than the charter or any resolution of the tors authorized. or than the necessities of the com- for expenses and reasonable expectations of losses

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required, that the protest against it is quite clearly expressed, and amply sufficient to make an equitable issue thereon.

4. And so, too, in respect to the third ground—notice. The allegation is, that nothing is on the books of the company, from which it could be seen that more than ten per cent of annual profits had been reserved, and that a resolution of the directors announced that they would not go beyond that per cent on profits annually, or two hundred thousand dollars in bulk, and that they had no actual notice of any sort. Besides, it would be a hard rule to charge those interested in a mutual venture with others, managed necessarily by a few agents, by presumptions of any sort, except quite strong, almost imperative, with constructive notice that the agents and managers had done what neither the charter of the company, nor their own resolutions, nor the exigencies of the management authorized.

5. Nor is there anything in the second ground, “because the parties named sue for themselves and others in like relation and the others are not named.” When sued as a class they may defend as a class, and if the cross-bill be a legitimate mode of defence, by asserting rights springing of the subject-matter of the bill, and asking relief thereon it may be filed by them as a class.

6, 7, 8, 9, 10, 11, 12, 13. And this brings us to the real issue made by this cross-bill, and the demurrer thereto—*to-wit*: is there equity in the cross-bill?

There is, if these classes, represented by the select men chosen by the complainant, who did not have insurance in the company at the time the bill was filed, had equitable rights to a part of the accumulated fund, to which the money they paid in, as they allege, contributed, by profit made while they were insured in the company.

The Code of this state declares that, “the contract of insurance is sometimes upon the idea of mutuality, by which each of the assured becomes one of the insurers thereby becoming interested in the profits, and liable for

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the losses, without a charter, such an organization would be governed by the general law of partnerships; when incorporated, they are subject to the terms of their charter." Code, §2836.

The necessary deduction from this legal principle incorporated into our Code is, that, except in so far as not changed by the charter, the general law of partnership, as to profit and loss, governs a mutual insurance company, just as the general law of partnership, as to profit and loss, governs all partnership *inter sese*, unless changed by the terms or articles of partnership. The stipulations between partners will control the partners and regulate their rights and liabilities *inter sese*, no matter what those rights and liabilities would otherwise be under the general law. When a charter is granted and accepted, and the entity called an incorporated company is created, the charter becomes the articles of partnership; or, to be more accurate, perhaps, in the use of language, the charter stands in the place of the articles of partnership, and modifies the general law as respects losses and profits, which, without its grant, would have governed, and the charter becomes the governor wherever the two authorities collide. Still, the general analogy between the entity based on mutual participation in profits and losses and the partnership based on the same thing remains; and, except as changed by the charter, equity will apply the general laws of partnership in respect to interest in and division of profits to the entity, which would be applied to such interest and division in the partnership, except in so far as the articles or contract between the partners had modified its application between the partners.

In the one case, the contract is made by the parties, and they make it what they please; in the other, it is made by those who agree to it by becoming members, insuring in it, paying premiums and risking losses and drawing profits, but it, unlike a mere partnership, must be born of the state, and live so long as the state permits by the

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charter which sanctions the contract made as each member enters; and the state also contracts, by the charter, with the entity, for the benefit of all who may become members of it.

The fundamental principle at the base of all partnerships is division of losses or profits, in some form or degree or other,—equal or otherwise, as the terms may be, so far as themselves are concerned. So our Code declares, §2836, *supra*, that in case of mutual insurance companies, “the idea of mutuality” involves the result that each assured becomes interested in the profits and liable for losses.

Does the charter of this company annul this idea of mutuality, or does it only regulate its mode and application, and enforce it, within certain restrictions there made? It seems to us that it recognizes fully the idea of mutuality, and makes each assured an insurer and a participant in losses and profits. The fourth and controlling section on the point is as follows, as amended in 1849 and 1856:

“SEC. 4. *And be it further enacted*, That whenever said corporation shall make any insurance on any property, the member assured shall pay the required premium in cash, or give his note, well secured, for the amount of the insurance money, payable one day after date, and shall deposit in money with the treasurer of the corporation at least ten per cent of said note, which shall be entered as a credit thereon, and the funds thus raised may be applied to the payment of the losses and expenses of the corporation, and in the event of an accumulated surplus beyond the necessities of the corporation, the directors are hereby authorized to divide the same among the stockholders thereof, according to the respective shares of their premiums, and the directors may, at any time when the necessities of the company require it, collect such further money as may be necessary, by making assessments on said notes, in addition to the original amount of each note, giving thirty days notice by mail to each member, but no member shall, in any event, be liable to pay more than his premium net or cash premium.”

Each assured is required to pay in cash, or give his note, well secured, for the insurance money, depositing ten per cent cash, and the funds thus raised go to the payment of

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nses and losses, thus making each liable for losses
e extent of his premium note or cash premium, but
ore, as provided in the last clause of the section.
as to profits and participation in them, the section
s that the directors are authorized to divide them,
n they become "an accumulated surplus beyond the
ssities of the corporation" "among the stockholders
of, according to the respective amounts of their pre-
ns." Thus every stockholder is interested in the
ts, because, when the fund, which, of course, is what
ins after paying losses and expenses, swells "beyond
necessities of the corporation," and the excess be-
s subject to distribution, he participates in the divis-
So obligation to pay losses to a certain extent, that is,
e amount of his premium, and participation in profits,
the fund reserved for the necessities of the corporation
nes larger than necessary, is the liability and privi-
of each stockholder. The idea of mutuality is not
fore destroyed, but enforced, if not by the letter, cer-
y by the spirit of the charter. But the very name of
ompany indicates that mutuality is its character, and
tedly in the pleadings the complainant avows that
is organized strictly upon the mutual plan, "and
that plan all of its operations have been conducted."
hat does "stockholder" mean in this section of this
er, and when must he be one, so as to participate in
ision? Is he a stockholder at the time when the
accumulated beyond the necessities of the corpora-
or is he one only at the time when the division is
? If he had been for ten years a stockholder, and
g those ten years profits had been made to the
nt of half of this million of dollars, and had ceased
ure, or renew by receipt his policy, a week before
ill was filed, does he cease to be a stockholder, in the
of being entitled to share in what his money helped
ke? Suppose that he wished to continue and to re-
by receipt, and the directors, as they could do, had

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abandoned the state where he lived and his insured property was located, or the territory in this state where the property was located, and thereby had virtually cancelled his policy, without fault on his part, and before this was done and during his connection with the company, the whole of this surplus fund had accumulated, is it the meaning of the charter, full of the mutuality idea as it is, that though he had paid in every cent which, by the terms of the charter, he could be made to pay for losses, he should have not one cent of profits which had swollen to so large a fund during the time he was putting in his money, which with what others contributed, made every cent of the fund for distribution? Suppose that, at the time of division, not a stockholder then a member had contributed a dime to the fund, is it to be divided among them only, and are those whose money made it to be turned off with nothing? Is this the construction which a court of justice, either by law or equity, can rationally put on the word stockholder when used in the matter of dividing what a mutual company had made? The mutuality would be that those who with stock made the money should get nothing, and those who with stock made nothing should get all. Stockholder cannot mean here what it does in a stock insurance company where the owner of the stock may sell it, and another take his place by purchase. The only stock which is held by this company, under this charter, consists of premiums paid to insure property, not transferable, except with the consent of the property insured, and not then, except with the consent of the company. Stock paid into a company, not mutual, is not on to no property, but passes, in the manner in which the charter directs, from one to another person, at any price agreed on by the parties.

The language of this charter is in the alternative as to the mode of payment. It might be by note for all premium except ten per cent, or for cash. When the business was conducted on the note system, and territory was abandoned, or the policy-holder could, but did not

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renew his policy, and it became necessary to call for an assessment on his note or bond, could he plead in bar, "You would not renew for me, and therefore I will not pay that per cent"? Or, to put the case stronger, when he voluntarily ceased to renew, without any cause, and an assessment on his note was made and demanded, could he plead, "I am no longer in your company, and I will not pay it"? Would not the reply be, "We agreed to insure you for a year, on consideration that you paid this per cent when called on, and for the purpose of paying it, you are still a member of the company? We carried your risk in consideration that you responded. Had the risk been against us, you would have got the insured value of the property; but you were an insurer as well as insured, and you agreed to insure others while they insured you. Though now you are no member of the company, then, when the loss occurred, you were, and you must pay what you promised to contribute for losses." The charter still calls him a member of the company to contribute to losses. It says, "and the directors may, at any time when the necessities of the company require it, collect such further sums as may be necessary by making assessments on said notes, in proportion to the original amount of each note, giving thirty days' notice by mail to each member." What member? Only those still insuring, or all who gave their notes as members? "But no member," the charter adds, "shall, in any event, be liable to pay more than his premium note or cash premium." Again we ask, what member? Undoubtedly he who gave the note is the member alluded to, and is called such when the call is made on him, whether then insured or not, if the loss occurred when he was insured and insurer. So the same word, "member," is used in the beginning of the section, and "member, of course, is a stockholder. Shall he be a stockholder to pay losses, but not one to receive profits? Unquestionably the note system was dropped, and the directors could drop it, because the charter, as amended,



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puts it in the alternative, "the member so insured shall pay the required premiums in cash, or give his note or bond," etc.; but the cash simply took the place of the note, and whether the member paid cash or gave a note, the meaning of the word, as used in the statute or charter, is the same, and what it meant if one system was used is the same as it would have been had the other alternative been continued as the mode of payment of premiums.

Thus we conclude, from the statute of this state and the construction of this charter, that the idea of mutuality in the statute remains in the charter, and the true construction of the charter is, that a stockholder in this company, in respect to division of profits, is he who put stock in it in the shape of premium money, and if what he put in contributed to make a surplus fund of profits, whether in or out when the division is made, he remains a member to draw his share of such profits according to the amount of his premium paid, pro rated with that paid by others, who also contributed to the accumulation.

It must be borne in mind that, when the cash system was adopted in 1855, as the exclusive plan of the company, all sums that could be collected for losses at any time out of a member were paid; so that, whether he renewed or not, he had paid up all that he could possibly owe on account of the policy for that year, and having thus paid all he owed on losses, his equity to partake of profits is complete. On the note system, he need not pay till assessed; if not assessed until the note was barred, all unpaid was profits left in his pocket. So when he paid all the premium in cash, which took the place of the note, what was not needed for expenses and losses, or rather, in the cash system, probability of losses, ought to go in his pocket. The charter makes no distinction between the two modes. Necessarily, by the change, however, a reserve fund, which remained with the directors in the shape of secured notes under that system, under the cash system, must remain in, in the shape of money, with the directors; and such a fund, as, ju

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as much as is necessary to provide for contingencies of probable loss by fire, should so remain. The excess over this should be divided from time to time among those who, under the present system, would have retained it in the part of the note assessed and unpaid. The decree itself recognizes that stockholders and members are synonymous, and such must be the meaning of the charter. If a member when the money had been made, beyond what the necessities of the company required as a reserve fund to meet its exigencies, and when a dividend should have been, therefore, declared thereon, he remains a member, and therefore a stockholder, and if it is declared, for the purpose of receiving his share, because he has paid all that the charter required him to pay of losses, and what he was entitled to for profits then was equity.

Equity regards that done which should have been done. If the surplus over a proper reserve fund was in the coffers of the company, equity, therefore, if it appears that it should have been divided while the member was still insured, and that the dividend would have allotted to him a share, considers the dividend declared and his part given him. If the directors ought then to have declared and distributed the dividend, equity will decree that they do so now, and will distribute it as it would have gone then. So that, when the allegation in the cross-bills is that a surplus for distribution was on hand when the complainants' cross-bills were insured, and that the premiums they contributed to it, equity will hold them entitled to it now, if it be still on hand and surplus still, and therefore demurrer admitting the allegations in the cross-bills would have been overruled.

Indeed, the very essence of mutuality is, that those who contribute to produce assets are interested in proportion to their contributions, and if others manage for them, are trustees or *custodians* *que trust*, and the managers trust; and equity will prevent misappropriation, or decree

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restoration, if improperly withheld. 22 Conn., 133, 145-6; 24 Am. R., 172-3; 34 Me., 451; 57 N. Y., 196.

The chart of the managers or directors is the charter; they must be guided by that; if they go beyond its limits, equity will restrain them, at the suit of those interested; and if they accumulate a fund from profits in excess of that allowed by the charter for a reserve fund to meet casualties of fire, and bring that fund into equity to declare its status and owners and direct its distribution, or the distribution of its interest, equity will take charge of the fund and decree that the surplus be separated from the legitimate reserve, and divided among the equitable owners. So that, in the case at bar, if the fund whose status and the owners of which fund are inquired of by the bill, be more than the charter authorized, which defines it as a sum necessary for the corporation—which means necessary to transact its business and, by necessary implication, to provide for contingencies of fire—that surplus, beyond what is legally retained, is ready for distribution now among those true owners thereof, the equitable owners, those whose money made it, and equity will immediately, and in the same proceeding in which it defines the status and owners of the fund, turn it over to them. The legal title to it may be in the corporation, but the true equitable title is in the contributors to it. We think that the above is deducible from *Singleton vs. S. W. R. R. Co.*, 70 Ga., 464, and *Georgia R. R. Co. vs. Smith et al., Comm'rs*, 71 Ga., 863; 40 Ga., 582, 583, 620, 621, 623, 627; 4 Peters, 152; 57 Me., 286-7-9; 34 N. J. L., 489; 2 Conn., 579; 18 How. (U. S.), 331, 342-3; and *Pickering vs. Stephenson*, L. R., 14 Eq., 322, (2 Abbott's Dig., No. 55, p. 711.)

To construe this charter correctly, reference must be made to the entire fourth section, as amended by the act of 1856, now under review; to the note system, as well as to the cash system; for both are in it, and the meaning of it is reached only by examining it in the light of both. It was organized first on the note system, ten per cent of

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cash only being paid in; and if loss occurred, assessments were made on the reserve to meet that loss, the reserve being those notes on the insured in the possession of the company, the insured being also mutual insurers with all others to the amount of their notes. When expenses and losses were all paid by the cash in and the assessments made on the notes, the notes were cancelled and the profits of each, thus mutually insured and a mutual insurer, was the unpaid part of the note thus cancelled, and not a cent more of which could be collected from the maker.

When the note system was abolished and a pure cash system took its place, the change simply put cash in the place of notes, less insurance, I suppose, being charged. But the charter had authorized a reserve fund; and the far-seeing managers provided for it in certain resolutions fixing ten per cent on profits as the annual contribution to that reserve fund, and for the remaining part of the profits scrip was to be issued annually to the policy-holders for one year, to be paid when the cash means of the company amounted to two hundred thousand dollars. So that they, the then directors, considered ten per cent on profits as the annual measure to pile upon the reserve fund, and for the balance scrip was to be issued, payable when that fund reached two hundred thousand dollars. This scrip was profits, which took the place of what was left unpaid in the notes of the policy-holders when cancelled. Whatever was not issued to a then stockholder entitled to it, he is entitled to that now; because he has paid all his contribution to the losses while insurer and insured, and is entitled to his share of profits while so insurer and insured.

14. We cannot see, as contended for by the able and learned counsel for the corporation, that the principle of mutuality was destroyed by the act of 1856, which makes the fourth section, cited above, read precisely as cited. It was not contemplated, either by the general assembly or

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the corporation, to kill mutuality, or to inflict upon it any dangerous wound. It authorized a change in the mode of contribution to the capital, the right to reserve a fund necessary to meet emergencies, and then retained the mutuality of all stockholders in participating in profits made during their membership, inasmuch as they had prepaid their full share of the fund for losses.

We see very plainly that the sufficiency of the limit of two hundred thousand dollars cash, to fix the time when the scrip should be paid, cannot apply to all years, because the amount of risks varies with the different years. According with the increase of business will be the increase of risk, and proportionately will the amount of cash necessary to meet that risk increase. But it is not so clear how the per centum on profits annually applied to the reserve fund should be increased. With the increase of the volume of business, the premiums and profits ought to increase, and increased profits ought to set off increased risks, and the per centum should be the same every year, unless in case of unusual destruction by fire, which is, I apprehend, provided for in the estimate originally made of ten per cent. Besides these cross-bill complainants allege that these and similar resolutions fixing this per cent of scrip for annual profits, after deducting ten per centum, were published from year to year in order to invite insurance, and that some of them were induced thereby to insure. If so, it would add weight to their right to hold the company to its publication and to keep the directors within the limits of reserve, which they thus fixed, and appropriate the balance to profits for stockholders.

15. The equity of those forced out without fault, is greater than that of those voluntarily retiring; for while the right to decline longer to insure in certain territories is conceded, it does not follow that, when the corporation does withdraw and decline to renew policies, it must not account for past profits made by the money of the Alabama, South Carolina, Florida or Mississippi policy-holders,

while they were insured. The company may refuse to renew,—nay, it may cancel a policy ; but when it annuls for the future, it must settle fairly for the past. It may dissolve the partnership with some who were members, but it is liable for what it owed them at the dissolution.

But applying the analogy of partnership law again, it would seem clear that, as the corporation might dissolve, so might the corporators, such of them as chose not to do business longer in that concern, also dissolve. It is the right of all, of each, unless restricted by contract or charter, to cease to insure, and thus dissolve the relation ; and exercising this right they forfeit no profits previously made, but carry into voluntary retirement their just portion of the profits made while members.

16. No statute of limitations can apply to all of these cross-bill complainants, because many of them—Carlton, for instance—were insured but a year or two before the bill. Besides, the relation makes a sort of trust, a continuing trust, and the statute does not bar, especially until the limit is complete after knowledge of the acts of the trustee which made the fund accessible for distribution. The allegation is, that the conduct of the directors in reserving more than ten per cent of profits was unknown, and on the books and nowhere else could it have been known by these defendants, no matter how diligent in inspecting records open to them ; and that the filing of these pleadings by the complainant is the first notice they had thereof. Besides, deception in fact, though not in design, is alleged, which amounts to legal fraud, and the statute begins when it is discovered.

17. We do not see that any demand was necessary, in view of the facts developed in this case. It seems, however, that, by abundant caution, it was made prior to the filing of the last cross-bill, which seems to have contained all the allegations preceding it in substance. 61 *Ga.*, 329, 335 ; 29 *Id.*, 294, 273 ; 13 *Id.*, 287 ; 49 *Id.*, 373 ; 6 *Id.*, 265 ; 11 *Id.*, 438, 445 ; 32 *Id.*, 245 ; *Hooper & Co. vs. Crawford*,

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September Term, 1883. But, really, where parties are called in by a stakeholder, whether directors, agents or trustees, to contest for a fund, where is the necessity of demanding it or the share claimed?

See, generally, on the above points, cited by plaintiff in error: 63 Me., 99; 7 Paige, 198, 202-3; 33 Conn., 446, 455-6; 42 *Id.*, 17, 27; 7 Allen, 255, 512, 517; 45 Barb., 510; 13 Ill., 516; Morawetz on Corp., §§381, 346, 344, 425, 405, 376, 403, 434, 404, 39 Ind., 289, 371; 50 Miss., 662; 57 Me., 286; 36 Ind., 423; 22 Conn., 133, 145-6; 83 Pa. St., 293; 9 Allen, 319; 34 Me., 481; 3 Mason, 311, 312, 57 N. Y., 196; 2 Conn., 579; 18 How. (U. S.), 331, 342-3; 34 N. J. L., 489; 4 Peters, 152; 15 Ala., 501, 513; 22 N. J. Eq., 471; 57 Ill., 424; Code of Ga., §§3084-5-6, 3193-7, 3255; 11 *Ga.*, 195, 438, 445; 32 *Id.*, 245; 6 *Id.*, 265; 49 *Id.*, 373; 13 *Id.*, 287, 478, 482; 40 *Id.*, 582, 623, 627.

18. The principles deducible from these authorities approach the questions made here, and throw light upon them; but, really, none cited by either side is so similar to the case at bar as to control it. The construction of charters is like that of wills—each is a separate thing, and ordinarily must be construed by itself. In the light of such authorities as vigilant counsel on both sides have produced, we read our own Code and the charter of this company, and construe it to mean what is indicated above.

It will be well to add that this opinion does not collide with the general rule that the declaration of dividends is matter much in the discretion of the directors of corporate bodies, and equity is loth to disturb their action. This case is without that rule, entirely untouched by it. Here the directors themselves say that they have a fund ready for distribution, in whole or in part—*corpus* or issues—and wish the court to instruct them in respect to the owners of it, with a view to its distribution. The meaning of which is, that they are ready to declare a dividend, but do not know among whom to make it, and hence ask instruction in the

premises. It is, in truth, a case made by trustees having assets for distribution, and inquiring, "How shall we distribute?" If this corporation were at an end, and all it had were assets for division at its dissolution, it would scarcely be doubted that all whose money helped to make the assets should share the profits. That is this case as to this fund. The corporation declares a part of its assets which it wishes to divide; *quoad hoc*, it dissolves, and all who contributed to make the assets should share them.

It follows that the cross-bills should not have been dismissed, and, of course, that the decree, being founded on a verdict in the finding of which the jury was not permitted to find upon the allegations in the cross-bills, necessarily falls. And here, strictly, the duty of this court ends; but counsel desire us to give a guide to the new trial which must be had, and we propose now to indicate the course which should be pursued, if the facts, as alleged in the cross-bills and admitted by the demurrer, be not contested as true, but be admitted on the re-hearing as the truth.

(1st.) The court below should ascertain the whole amount of the cash reserve fund on hand at the time of the trial and decree, including all accretions and interest.

(2d.) What amount is necessary to enable the directors successfully to operate and manage the affairs of the company, so as, with the cash premiums paid from time to time, to insure the payment of losses by fire.

(3d.) The balance on hand, after deducting this necessary reserve, will be the fund for distribution, and an equitable distribution thereof should be decreed.

(4th.) In order to make this decree, the court should ascertain the amount in scrip which was actually issued annually, and what should have been issued for each year after the deduction of ten per cent for reserve, and who were the policy-holders of that year, either by policies issued or by receipts renewed, and the cash premium each paid for that year; and thereupon it should decree that the difference, if there be any, between the scrip issued to each,

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and what should have been issued after the ten per cent reservation, is, in equity, his money, and should be decreed to him as of that date now. And so on from year to year, since, under the amended charter, the reserve fund was put in operation, excepting, always, those policy or renewal receipt-holders, who have sustained losses and been settled with.

(5th.) If this distribution among policy-holders of each year should not exhaust the fund for distribution, then the remainder should be divided between all who have paid money on premiums to the company at any time since the inauguration of the policy, under the amended charter, of a reserve fund, *pro rata* to the money contributed respectively, excepting, as before, those who sustained losses and have been settled with.

(6th) The present company, under its present management, is the best possible receiver. Let it retain the fund for distribution as such; make public the decree by proper advertisement, specifying the classes, and, if practicable, the persons entitled thereunder; and pay, on demand, to each person entitled, or his legal representative, his share; and if no demand be made within seven years from the date of decree by any person so entitled, let him be forever barred.

(7th.) So long as the present charter shall remain unaltered, let the future accumulations from profits be divided among those who hereafter pay money on policies or renewal receipts, in proportion to the amount respectively paid.

It will thus be seen that the fundamental principle on which this opinion rests is, that this company, by its charter, became a mutual insurance company; that no amendment thereto has altered the nature breathed into it when first the general assembly gave it birth, but it remains today a mutual insurance company; that thus liability for losses and participation in profits became an ingredient in the character of each assured and insurer, and there-

fore. when each paid up his whole liability for losses, he became entitled to share the profits, The venture was mutual between all the members, and while the legal title was in the corporation to everything, the equitable interest was in the corporators, whose contributions made it all. And while the charter provides for a division among stockholders, that word is synonymous with members, and the true intent and meaning of the word, as used in respect to a division of profits, is members when those profits were made, as well as those who were members when dividends were declared, if their contributions helped to make those dividends. Therefore, if, in particular years, dividends declared, after deducting the reserve on profits, were below what was prescribed by resolution of the directors as their measure, the fund being brought into equity, equity will treat that as done which ought to have been done, and will decree to those who were members during those years, whether in the company now or out of it now, what ought then to have been paid them, to be paid first out of the fund in court for distribution. Further, as the fund is brought into court now, and its legal status, in respect to true ownership, is asked, in order that part of it, or at least its interest and increase, may be divided, equity will regard such a prayer for instruction, with the view of dividing, as equivalent to the declaration of a dividend, upon such rules of equity and such status of the fund and its ownership as are just and equitable; and, inasmuch as it is impossible to determine precisely the exact equity of each of the assured and insurers by tracing the contributions of each policy-holder into all its fruits individually, it will consider each as having contributed to the fund in hand, if paid since that fund was inaugurated, in proportion to what each paid the company, and hold each contributor entitled to share in this dividend, which the directors contemplate, and in respect to the equities of which they very properly ask advice and direction.

19. Moreover, this court sees that the great trust com-

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mitted to these managers of a great corporation has a double aspect. They must look to the future, as well as to the present and past. They manage a scheme, which will live when they are gone. They must be careful to transmit to their successors, for managing for future insurers and assured, a body politic as healthy and sound as that which they nurtured so wisely and well. To that end, they must guard the sinew and muscle—nay, the heart whence issues the blood, without which the body will waste and die—sinew, nerve, muscle, all perish—the credit of the company. To preserve that, there must be means to pay policies promptly when due by reason of loss, and the reserved fund, authorized by charter and preserved by them hitherto, must be so kept, to the extent which the necessities of the corporation demand. Equity tries to seat herself in their chairs and around their board, and, while keeping her eyes open to all the past, to see the rights and equities of all who are now and have been their *cestuis que trust*, not to shut them to those who will be the *cestuis que trust* of the future management of the corporation : but she will direct that justice be done to all.

Hence, the decree which this court would make, if facts admitted now be not contested, is, that a reserve fund, sufficient for the future necessities of this corporation, which will live when all of us are dead, be estimated and ascertained by the testimony of the directors and managers of it, and of such experts and others as may be examined on either side, and other legitimate testimony, and be preserved as a reserve fund ; and that the remainder of that in the hands of the directors, at the time of the decree, be divided among past contributors as heretofore indicated.

Little contributions from time to time, carefully husbanded and judiciously invested, have made a great heap in the hands of those entrusted with it, until it has become fit to be inquired into, and judicially investigated and adjudicated. The matter has been carefully considered. No parallel case has been found by this court, or cited by the

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able array of counsel employed on every side, by which we may be guided out of a labyrinth, where the pathway to light and truth is not easily discerned. Streaks of light here and there have fallen upon it, and we have followed the course indicated by them. We hope we have emerged into broad daylight, recognized by equity, if not visible to those who look through glasses stained by prejudice or smoked with self-interest.

Judgment reversed.

Cited for the company : Acts of 1847, pp. 123, 128, 126; Acts of 1849-50, p. 207; Act 21st December, 1849, amendatory of the charter of defendant in error; Acts of 1849-50, p. 265; Acts of 1855-56, p. 477; 67 *Ga.*, 106, 113, 456, 459, 463; 21 *Md.*, 51, 90, 91, 92; 80 *Pa.*, St. R., 31 (12); Field on Corp., 103, 104, 109, 152, 155, 432; Pierce on Railway Law, 32; Angel & Ames on Corp., 279; 5 Watts & Serg., 223, 243, 245; 6 S. & R., 504; 9 Otto, 463; 12 Barbour, 27; 23 *Ib.*, 578; 3 Wallace, 583; 4 *Ib.*, 255; 61 *Ga.*, 467; Phillips on Ins., 523 (a); 52 *Ga.*, 640; 1 Wheaton 283, 6 Gray (Mass.), 77; 24 N. H., 428; 1 Beasley (N. J.), 333; Code of Ga., §2836; 11 Mich., 425, 444; 14 Am. Dec., 114; 12 East., 22, 340, 341; 18 Ver., 512; 50 *Ga.*, 479; 55 *Ib.*, 431; 61 *Ib.*, 33, 614; Code, §4191; 11 *Ga.*, 556, 569; 43 *Ib.*, 15; 61 *Ib.*, 467; 33 Conn., 447, 455; 7 Paige, 198; 41 Conn., 463; 55 *Ga.*, 329; *Mason vs. Atlanta Fire Co.*, 70 *Ga.*, 604; *Coates & Co. vs. Allen et al.* 71 *Ga.*, 787; 48 *Ga.*, 109; 54 *Ib.*, 384; 57 *Id.*, 341; 12 Wallace, 681; Code, §4181; 3 *Ga.*, 424; 13 *Id.*, 478; 14 *Id.*, 167; 1 Wallace, 167; 40 *Ga.*, 199; 45 *Id.*, 156; Code, §§4206, 4210; Rule 7., Rev. Code, p. 1355; 66 *Ga.*, 18; *Glenn & Son vs. Shearer*, 44 *Ga.*, 16.

The leading authorities for plaintiffs in error are cited in the decision

Poullain *et al.* vs. Poullain, Sr., and *vice versa*.

POULLAIN *et al.* vs. POULLAIN, SR., and *vice versa*.

1. Where the judge certifies in the bill of exceptions that a new trial was granted on a special ground, but the order in the record is general and specifies no particular ground, the latter will control.
(a.) There was no abuse of discretion in granting a new trial in this case.
2. Where exceptions to a master's or auditor's report in chancery are sent to a jury, they should pass upon them only so far as the matters of fact submitted are concerned, and must return a verdict on each exception *seriatim*. They are not authorized to pass over the exceptions made by one of the parties without any return as to either of them, or having found on each of those submitted by the opposite party, to aggregate the sum found under each particular head, whether this be done correctly or erroneously.
3. Neither the general statute of limitations nor the act of March 16, 1869, was applicable to this case. No cause of action could accrue during the minority of these complainants and during the continuance of the fiduciary relation between them and defendant.
4. Letters of dismissal granted to a guardian under section 1849 of the Code, like other judgments of courts of competent jurisdiction, are a bar as to the matters covered by them, unless set aside for fraud in their procurement, or for other sufficient cause.
(a.) The right to re-open a final settlement between a guardian and ward within four years after it is made, relates to settlements between the parties themselves, without the interposition of a court of ordinary, and not to a discharge of that court, upon final settlement and after due citation and publication of notice.
5. The cases of *Beall et al., ex'rs, vs. Clark et al.* and *Hughes vs. Hughes* (last term) cited as fixing the amount and character of the evidence necessary to decreeing the specific performance of a parol gift of land by a parent to a child.
(a.) Costs in both cases taxed against plaintiffs.

April 8, 1881.

Practice in Supreme Court. Equity. Verdict. Statute of Limitations. Guardian and Ward. Judgments. Ordinary. Before Judge LAWSON. Greene Superior Court. September Adjourned Term, 1883.

Anna M. Poullain and Hallie B. Poullain (the latter through Anna M. as her next friend) filed their bill against Thomas N. Poullain, alleging, in brief, as follows: Junius

Poullain et al. vs. Poullain, Sr., and vice versa.

Poullain, the father of complainants, died in Floyd county in 1862. Their mother was about to take out letters of administration on his estate, but defendant, who is their grandfather, proposed to relieve her of the trouble of administration, and to preserve the estate for her and her children just as it had been enjoyed during the lifetime of Junius. Defendant procured one McCullough to administer on the estate, and defendant himself became the guardian of complainants. In 1863, he received from the administrator \$1,600.00, which was the share of complainants in the personal property of their father's estate. This was all that defendant had charged himself with as guardian, though, in fact, he had received other large amounts of property. When complainants' father died, defendant held the title to a certain plantation in Floyd county; in so doing, he was the naked trustee of the former, who was afflicted with epilepsy. After the death of Junius, defendant took possession of the place, and shortly thereafter sold it to an innocent purchaser without notice; and defendant became liable to each of complainants for one-third of its value, which was placed at \$10,000.00. Defendant also had the charge and management of a one-seventh interest in what was known as the Fontenoy Mills property, which interest belonged to them, and he had received considerable sums therefrom. (An account was attached, including items extending from 1863 to 1868.) One William S. Poullain, an uncle of complainants, died in 1862, leaving an estate in which complainants had an eighth interest. Defendant was surety on the bond of the administrator, and permitted the claim to become barred by the statute of limitations, and thereby became liable to complainants. (This claim, on account of the estate of William S. Poullain, seems not to have been pressed on the trial.) They have received nothing from defendant, except their support and education and a house and lot in Greensboro, furnished to them and their mother in 1879. The prayer was for an account and settlement.

Poullain *et al.* vs. Poullain, Sr., and *vice versa*.

Defendant answered, in brief, as follows: Admits receiving \$1,600.00 as the guardian of complainants, arising from their father's estate. That was all he ever received, and it was invested in Confederate securities, which proved worthless. There was nothing else coming to them from their father's estate, except their *pro rata* share of \$126.91 in Confederate money, which is still in the hands of the administrator. Denies that the Floyd county plantation belonged to the father of complainants; asserts that it belonged to defendant, and complainants' father was allowed to remain in possession simply as a tenant at will; denies that complainants or their father owned any interest in the Fontenoy Mills property, but asserts that it was owned exclusively by defendant; denies that he received any income from that property as guardian of complainants, sets out an account of advances made to complainants, amounting to \$14,294.89, and prays a decree for balance due to him. By amendment, \$4,620.00 was added to his charges. Alleges that on April 7, 1879, he was regularly discharged from his guardianship of Anna M. Poullain by a judgment of the court of ordinary having jurisdiction of the matter, she having become of age; pleads that Anna M. became of age on the——day of——, 187—; that the *gravamen* of this case is a cause of action which arose prior to June, 1865; that she did not bring suit within nine months and fifteen days after becoming of age, and is barred; also pleads that he is still the guardian of Hallie B. and entitled to the possession of her property, and that she cannot, by this suit, recover it from him. The entire estate of William S. Poullain became worthless by reason of the results of the war.

The case was referred to an auditor, the substance of whose report was as follows:

“ 1st. That the title to the house and lot in the city of Greensboro, Georgia, mentioned in the bill of complainants, was in the defendant until March, 1879, and that he did not hold said property in trust for complainants.

“2nd. That complainants had no title to the real estate in Floyd county, Georgia, which they mention in their bill, and cannot recover it or the proceeds thereof, for the reason that the statute of frauds prevents them from asserting title to the same, and that defendant is not estopped from pleading said statute.

“3rd. I find that the investment made by the defendant, which he mentions in his return of May 24, 1864, to the ordinary of Greene county, Georgia, relieves him from all liability to complainants for the money he received, as their guardian, from the administrator of their father's estate.

“4th. I find that the discharge of the defendant as guardian of Anna M. Poullain is a bar to any right of action which said Anna M. ever had against him as such guardian

“5th. I find that the other complainant cannot maintain her action against the defendant, she being a minor, and he being her guardian.

“6th. I find no evidence sufficient to establish the title of complainants to any of the Fontenoy Mills property, or its dividends.

“7th. I find that the evidence does not show that the defendant ever gave, or intended to give, the real estate in Floyd county, Georgia, to the father of complainants, and that they have no title, or acquired no title, by prescription.

“If I have made a mistake as to the law and facts of this case, then I report that the defendant, as guardian and trustee, is chargeable with the sum of \$7,002.01, which sum includes interest to September 15, 1880, and that he has expended the sum of \$8,347.55 for the maintenance and education of complainants, which said expenditures are an equitable set-off against the sums chargeable to him (the defendant) as guardian and trustee; but that said defendant is entitled to no judgment against complainants for the excess of his expenditures over the sums charged against him.”

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To this report complainants filed nine exceptions, one of law to the fifth division of the report, and the others of fact. The exception of law was sustained. Defendant also filed exceptions.

It is unnecessary to detail the evidence on the trial of the exceptions of fact. The jury found as follows :

“We, the jury, find for plaintiffs the first exception.” (And so of each of the successive exceptions of complainants.)

“We, the jury, find for the complainants \$7,733.00.”

Defendant moved for a new trial, on the following among other grounds :

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the verdict was contrary to the following charge of the court: “As a general rule, the mode of conveying title to land is in writing, but it may be conveyed in other ways. If a father puts a son in possession of land, with intention to give it, and the son remains in possession for seven years, his title becomes perfect, though there is no writing; but if his possession is less than seven years, he does not acquire title. It is admitted that Junius Poullain did not remain in possession of the Floyd county land for seven years, and therefore he did not acquire in this way, and you cannot, on this ground, find for the complainants. If a father puts a son in possession of land with intention of giving it to the son, and the son places valuable improvements on the same, that would give the son a title. Under the evidence of such improvements, complainants’ evidence that such improvements were placed on the land must be stronger than the defendant’s evidence on the subject.”

(3.) Because the court failed to give the following in charge: “If one of the complainants, Anna M. Poullain, failed to bring suit within nine months and fifteen days after she attained majority, then her right of action was

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barred at the time suit was brought, under the limitation act of March 16, 1869."

(4.) Because the court failed to charge as follows "That if one of the complainants, to-wit, Anna M. Poullain, was of age at the time her guardian was discharged by the ordinary, then that discharge operated as a bar to her right to recover in this suit."

(5.) Because the court refused to charge the jury at all on the question raised by the pleadings of defendant, as to whether or not the complainant, Anna M. Poullain, was barred by the limitation act of 1869, and in refusing to charge the jury at all as to the legal effect of the discharge of the defendant from the guardianship of said Anna M. Poullain, which discharge was pleaded by defendant as a bar to her right of recovery in said case, and exceptions were filed by complainants to the finding of the auditor in favor of said discharge.

(6.) Because the jury failed to pass upon any of the seven exceptions filed by the defendant to the auditor's report.

The court granted a new trial. The bill of exceptions contains the following recital as to the ground on which it was granted :

"His Honor aforesaid granted said new trial, as he stated in his opinion, on the ground that there was no evidence that such valuable improvements had been made by Junius Poullain, the father of said complainants, upon the Floyd county plantation, described in the pleadings and brief of evidence aforesaid, as would relieve complainants from showing a seven years' possession by said Junius Poullain of said plantation: and the judge aforesaid was satisfied with said verdict as to all other points."

In the record the order is merely that "the verdict be set aside and a new trial be granted," without stating any ground. Complainants excepted to the grant of the new trial, and defendant filed a cross-bill of exceptions, because it was not granted on all the grounds taken.

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JAMES B. PARK; F. C. FOSTER; JOHN C. REED, for complainants.

H. G. LEWIS; J. A. BILLUPS; D. B. SANFORD, *contra*.

HALL, Justice.

1. In the bill of exceptions, the judge certifies that he granted a new trial in this case upon a special ground, while the order directing it is general and specifies no particular ground, as it appears in the transcript of the record. We are governed by the latter, and as there is much conflict in the evidence bearing upon the main points in the case, and a considerable degree of irregularity in the proceedings had on the trial, and no small amount of confusion in the several findings by the jury of the issues submitted to them, we think the court was right in ordering another hearing; at least, that he did not abuse his discretion in so doing. Here we might, and probably ought, to leave this case, without determining any of the numerous questions made by either of the bills of exceptions and writs of error sued out by each of the parties, but as our views have been invoked upon several of these points, we will briefly notice them.

2. When exceptions to a master's or auditor's report in chancery are sent to a jury, they should pass upon them only so far as the matters of fact submitted are concerned, and must return a verdict on each exception *seriatim*. Code, §4203. This does not authorize them, as was done in this case, wholly to pass over the exceptions made by one of the parties, without any return as to either of them, or, having found on each of those submitted by the opposite party, to aggregate the sums found under each particular head, whether they do this correctly, or very inaccurately and erroneously, as in this instance. It is the duty of the chancellor to make up his decree from the report of the auditor or master, as corrected by the several findings of *the jury*. But from the ambiguous and doubtful character

of these several findings, without calling to his aid matter *dehors* the record, this would have been impossible; indeed, to a stranger to the proceeding, the matter, as presented by the record, is wholly unintelligible.

3. We do not think the statute of limitations, either as to the general provision found in the Code, or the special act of March 16th, 1869, applicable to this case. Certainly no cause of action could accrue during the minority of these complainants, and during the continuance of the fiduciary relations between them and the defendant. There was, therefore, no error in refusing to charge, at defendant's request, upon this subject.

4. But we are of opinion that the court should have charged upon the effect of defendant's final discharge from the guardianship of the elder of the two complainants by the ordinary. Letters of dismissal granted to a guardian, under section 1849 of the Code, like other judgments of courts of competent jurisdiction, are a bar as to the matters covered by them, unless set aside for fraud in their procurement or for other sufficient cause. 4 *Ga.*, 516; 9 *Ib.*, 247; 15 *Ib.*, 346.

This settlement cannot be opened for any other cause. The right to re-open a final settlement between the guardian and ward, within four years after it is made, relates to settlements between the parties themselves, without the interposition of the court of ordinary, and not to discharges of the guardian by that court upon final settlement, and after due citation and publication of notice. This right to re-open within the time specified, is regulated by Code, §1847, which should be read in connection with *Ib.*, 1840. See also 59 *Ga.*, 793; 68 *Ib.*, 741.

5. Without expressing any opinion whatever as to the testimony developed by this case, which, for obvious reasons, would be improper, we refer to *Beall et al., ex'rs, vs. Clarke*, and *Hughes vs. Hughes*, both decided at the last term of this court, as fixing the amount and character of the evidence essential to decreeing the specific perform-

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ance of a parol gift of land by a parent to a child. The result of our research is, that the plaintiffs' bill of exceptions cannot be, while that of the defendant is, sustained, so far as to tax the former in both cases with cost.

Judgment affirmed.

THE CITY OF ATLANTA *vs.* BELLAMY.

Although this court would not have disturbed a verdict, were they vested with discretion to grant or refuse new trials, such discretion is vested in the judges of the superior court, and unless it has been palpably abused, the grant or refusal of a new trial, on the ground that the verdict is not supported by the evidence, will not be reversed.

(a.) Suits against municipal corporations for damages resulting from slight depressions or elevations made by displacing paving, flag stones or bricks used in the construction of streets should be discouraged.

April 25, 1884.

New Trial. Municipal Corporations. Damages. Before Judge CLARK. City Court of Atlanta. December Term, 1883.

W. C. Bellamy brought case against the city of Atlanta for damages resulting from a fall, which he alleged occurred by reason of the defective condition of the paving on the sidewalk of one of defendant's streets, negligently allowed to remain in that condition after notice and opportunity to repair.

On the trial, it was proved that plaintiff stepped into a depression or hole in the sidewalk, while passing along, about dusk in the evening, fell and was injured. The evidence as to plaintiff's habits of sobriety and the nature and extent of the injury was conflicting. As to the character of the hole into which plaintiff stepped, he testified as follows: "The hole in the sidewalk, which caused my fall, was about four inches wide, I think, and was as long as the flag stone was wide, say about eighteen inches long,

and I should judge it was several inches deep. It was about dusk when I stepped on the edge of the hole, and I did not see the hole; I don't think I ever saw the identical hole before. At the time I fell, I was walking in ordinary way."

Lynch, a witness for the plaintiff, described it as follows: "The hole had been there seven or eight months before the Saturday evening on which I saw a man fall and two negroes pick him up. A common brick would more than fill up the hole. It was where two flag stones did not exactly come together, and most of the time a brick was in it, and frequently it was filled up with dirt, but the water would occasionally wash it out. The hole was not as deep as a brick of common size, and about as long. The hole was longer than a brick, say about nine or ten inches, about four inches wide, and not quite as deep as a brick is thick, less than two inches deep. I filled the hole up myself several times, but it would wash out again. The flag stones did not fit up close at first, and my opinion is that the hole was there from the time the sidewalk was made."

The jury found for defendant. Plaintiff moved for a new trial, which was granted, and defendant excepted.

E. A. ANGIER; W. T. NEWMAN, for plaintiff in error.

READ & CANDLER; REUBEN ARNOLD, for defendant.

HALL, Justice.

This is the first grant of a new trial in this case, which we think was hardly warranted by what is disclosed in the record. There was some evidence, however, upon which the jury might have found differently, though its decided weight, as it appears to us, is in favor of the verdict. It is impossible to place ourselves in the position of the able and experienced judge who presided at the trial, and to have communicated to us what occurrences, during its pro-

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gress, may have influenced his action; doubtless he had what he deemed sufficient and satisfactory reasons for his course. He alone can exercise a sound discretion in granting or refusing a new trial. whether the verdict is sustained by the decided and strong weight of the evidence or by slight evidence only. It would require an extreme case to justify our interference with the exercise of this discretion—one in which an abuse of the power was palpable. This is the invariable rule of our action. We think it conservative, prudent and wise, and although in some instances it may work hardship, yet in the vast majority it tends to the maintenance of right and justice.

We hesitate not to say, from what we can gather from the proceedings before us, that we would not have disturbed this verdict, but, as before remarked, we had none of the advantages of observation possessed by the judge who conducted the trial and saw and heard all that transpired in its progress. We think that no encouragement should be given to actions brought against towns and cities for the recovery of damages resulting from slight depressions or elevations made by displacing paving or flag stones, or bricks used in the construction of sidewalks and streets. As was remarked by Mr. Justice Crawford, in *Rivers vs. The City Council of Augusta*, 63 Ga., 378, "Calamities and casualties are common to all, but because they occur, it by no means follows that such as may be so unfortunate are entitled to recover compensation in damages out of some person, either natural or artificial, who may be able to respond, notwithstanding it appears that such impressions are beginning largely to prevail." We cannot entertain the idea that "municipal corporations are insurers against accidents upon streets and sidewalks, or that every defect therein, though it may cause the injury sued for, is actionable. It is sufficient if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary mode, by night as well as by day." To require higher care

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and diligence, at the hands of the public authorities, would exceed the resources at their command, and would entail upon the community an unsupportable burden. It is impossible to ascertain speedily when the bricks, paving and flag stones on the streets are out of place, and to keep promptly in repair at all times trifling defects resulting from such causes. In all suits for damages resulting from such causes, these considerations should have weight with juries, whose peculiar province it is to pass upon questions of negligence, under directions from the court.

Judgment affirmed.

GRIFFIN vs. THE AUGUSTA & KNOXVILLE RAILROAD.

1. When this case was first before the court (70 Ga., 164), it was held, in effect, that there was no equity in the bill, and that the complainant had an adequate common law remedy.
2. A demurrer having been filed at the return term of the bill, and at a subsequent term of court an amendment having been made, the demurrer renewed and notice thereof given, it went, not to the amendment, but to the entire bill.
 - (a.) The failure to give notice of the first demurrer did not work its dismissal.
 - (b.) An amendment which materially changes a case opens the bill as amended to demurrer or plea, but an immaterial amendment has no such effect.
 - (c.) The Port Royal and Augusta Railroad Company, having been incorporated by the general assembly of this state, sold under decree of the United States court, and the purchasers having organized themselves into a new corporation under the act of 1876, and filed their certificate of incorporation in the office of the secretary of state, it is not a foreign corporation.
 - (d.) A demurrer only admits such facts as are well pleaded, and where the bill alleges facts as true which are contradicted by legislative acts and records of which the court is bound to take judicial notice, it cannot hold such facts to be true, and they will not prevent the sustaining of the demurrer.
 - (e.) This case differs from that in 65 Ga., 614.

April 8, 1884.

Practice in Superior Court. Equity. Demurrer. Rail-

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roads. Judicial Cognizance. Before Judge RONEY. Columbia Superior Court. September Term, 1883.

Mrs. Griffin filed her bill, alleging that the Augusta & Knoxville Railroad had taken a strip of land, running across her plantation some two and one-half miles in length, had constructed its road on this strip, had taken timber for cross-ties, had dug earth for cuts and embankments, leaving pits in which the water became stagnant, causing miasma, injuring the drainage, etc. ; that the company was insolvent, had defaulted in the payment of the interest on its bonds, and was endeavoring to lease or dispose of its franchises to parties unknown. The prayer was for an accounting, the payment of damages, and an injunction to prevent the company from disposing of its property or from further taking or using complainant's property until compensation should be paid.

The company answered that the taking of the land was with the consent of complainant, and denied insolvency.

The chancellor refused the injunction, and the case was carried to the Supreme Court, where the judgment was affirmed. (See 70 *Ga.*, 164.)

On the return of the remitter, counsel for defendant announced that there was a demurrer to the bill. This had been filed at the first term, but no notice of it had been given, and counsel for complainant did not know of it. He moved to dismiss it because no notice had been given. The court refused this, and directed that written notice be served, and informed counsel for complainant that he would grant a continuance, if desired. This was declined.

Complainant amended the bill, alleging further default on the part of the defendant in the payment of the interest on its bonds ; that complainant had brought an action at law for damages, but failing to reach court until about half an hour after it was called for trial, for reasons set out, it was dismissed ; that she filed her bill under the ruling in *Chambers vs. Cincinnati & Georgia Railroad*,

69 *Ga.*, 320; that in August, 1883, the defendant leased its road, franchises, and all its property to the Port Royal Railroad for ninety-nine years; that this road, if a Georgia corporation at all, has only five or six miles of road in Georgia, and little, if any, property in the state; that it is itself leased to the Central Railroad; and that the latter is about to be leased to the Louisville & Nashville Railroad, a foreign corporation.

Defendant again demurred for want of equity. The demurrer was sustained, and the bill dismissed. Complainant excepted.

SALEM DUTCHER, for plaintiff in error, cited Code, §§4191, 4194, 4200; 65 *Ga.*, 51; Acts 1821, p. 77; Dudley R., 24; Hotchkiss, 942; 2 *Ga.*, 484; Code, (1863), §§4101, 4110; Acts 1847, p. 198; Code, §§204, 3246-7; 27 *Ga.*, 352; 32 *Il.*, 257 (2); 53 *Il.*, 458; 61 *Id.*, 33; 65 *Id.*, 652, 657, 724; 44 *Id.*, 634; 55 *Id.*, 350; 58 *Id.*, 184; 63 *Id.*, 437; *Huff vs. Markham*, 70 *Ga.*, 284; *Graham vs. Dahlonega Gold Mining Co.*, 71 *Ga.*, 296; *Powell vs. Cheshire*, 70 *Ga.*, 357; 51 *Ga.*, 379, 388; Code, §3130; 8 *Ga.*, 530; Code, §§3085, 3095; 31 *Ga.*, 282; 6 *Id.*, 157; 65 *Id.*, 614; Const. 1877, Art. 1, Sec. 3, Par. 1; U. S. Charters and Constitutions, 640 (Kansas), 513 (Indiana), 538 (Iowa), 1167 (Missouri), 899 (Maryland); 18 Kansas, 386; 26 Ind., 393; 23 *Il.*, 623; 39 Iowa, 340; 45 *Id.*, 23; 10 *Id.*, 545; 64 Mo., 457; 15 Md., 199; 16 N. Y., 99; 73 *Id.*, 579; 7 S. & M., 568; 3 How. (Miss.), 247; 40 Wis., 653; 37 Wis., 317; 21 Ohio, St., 667; 26 Ill., 438.

GANAHIL & WRIGHT, for defendant, cited *Griffin vs. Augusta & Knoxville R. R.*, 70 *Ga.*, 164; 7 *Id.*, 266; Code, 4200.

HALL, Justice.

1. This case was before the court, February term, 1883, upon a writ of error sued out because of the refusal of the

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injunction prayed, and we then affirmed the judgment, holding, in effect, that there was no equity in the bill, and that the complainant had an adequate common law remedy.

2. It seems that, at the return term of the bill, the defendant demurred to it on both these grounds, but neglected to give notice of the filing of the demurrer to the opposite party. For want of such notice, a motion was made, at the trial term, to dismiss the demurrer, which was overruled by the court, and complainant made an amendment to the bill, upon which the defendant renewed its demurrer upon the same grounds, and this time gave the notice required. The complainant insists that this last demurrer went only to the amendment; in this view, however, we do not concur, our opinion that being there was no necessity for this second demurrer, filed after the amendment was made, inasmuch as the failure to give notice of the first did not work its dismissal under section 4200 of the Code. It will be remarked that the form of notice is not prescribed, and the defendant had notice upon the hearing of the application for injunction; that these grounds of objection would be insisted on; besides an amendment which materially changes the case opens the bill, as amended, to demurrer or plea, but an immaterial amendment has no such effect. Code, §4196. The complainant insisted that this amendment did materially change the bill, inasmuch as it alleged that defendant had leased its entire road to the Port Royal & Augusta Railroad Company, which is a foreign corporation and is itself insolvent. If this statement were true, then would the amendment give to the bill the equity that without it was wanting. 65 *Ga.*, 614. But is the Port Royal & Augusta Railroad Company a foreign corporation? The Port Royal Railroad was incorporated by act of the general assembly of this state, approved December 19, 1859, Pamph. 324, 325, and having been sold under a decree of the circuit court of the United States, it was purchased on the 10th day of July, 1878, by

the Union Trust Company, for the bond holders, and these purchasers organized themselves into a new corporation under the act of February 29, 1876, p. 118, and filed their certificate of organization in the office of the secretary of state of Georgia on the 21st day of July, 1878, as the Port Royal & Augusta Railway Company. Under authority contained in the charters of both companies, the Augusta & Knoxville Railroad Company has been leased to the Port Royal and Augusta Railway Company. This domesticates the corporation to which the defendant company has been leased. It is quite true, as argued, that this is not in accordance with the allegations in complainant's amendment, but contradicts them. Although the demurrer admits the facts as true, it only admits such as are well pleaded. The court cannot hold facts as true, which are contradicted by legislative acts and records, of which it is bound to take judicial notice.

There are other marked differences between this and the case found in 65 *Ga.*, 614. In that, the damage had been assessed, and judgment rendered therefor by a court of law; there were difficulties in the way of the collection of the judgment, and the aid of the court of equity was invoked to remove them. This court held that, under such circumstances, the bill was not open to demurrer, for want of jurisdiction or power to grant the relief prayed. But we conceive that neither this nor any other court would or could hold, that a court of equity would be authorized to take the initiative in the assessment of damages. To aid the collection of a judgment rendered for damages is quite a different matter from taking cognizance of a suit for the recovery of damages. If the defendant company took possession of and is using the lands of complainant without instituting proceedings to ascertain the compensation to which she is entitled, they are mere trespassers, and are liable to be proceeded against as provided by their charter, or to an action of ejectment, or trespass *quare clausum fregit*, or trespass on the case for damages, either

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of which is quite as ample a remedy for her grievances as a court of equity can give. It should not be taken for granted that either the defendant, or the company to which it has been leased, would not satisfy the judgment of the court rendered in either of the actions here suggested.

Judgment affirmed.

FRANK vs. THE CITY OF ATLANTA.

1. Had there been no disputed facts in this case, and had its determination depended solely upon questions of law, it should have been disposed of on a motion for a non-suit; but there being both questions of law and fact involved in the issues made, the grant of the non-suit was error.
- (a.) Under a charter creating building inspectors, whose duty is to inspect all buildings and walls located on the various streets, lanes and alleys of the city, and giving power to the mayor and council to execute in a summary manner the recommendations of such inspectors, whether the mayor and general council had authority, upon the report of the inspectors and engineer to destroy a building which was reported unsafe, but which was located in the center of a block, and not on any street, lane or alley of said city; and whether, under a general power to extend protection to the citizens, the municipal authorities have authority to destroy such buildings?
Quære?
- (b.) Municipal corporations are confined to the exercise of powers expressly granted or necessarily implied, and a necessary implication must be so clear and strong as to render it highly improbable that the legislature could have entertained an intention contrary to such implication.
2. The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law under which it may be done should be closely followed.
3. If the house was destroyed to abate a nuisance, the proceeding was not in accordance with the charter of the city of Atlanta (§67, acts 1874, p. 133), which conferred authority to cause such nuisances to be abated as are likely to endanger the health of the city or of any neighborhood only upon the report of the board of health, and in pursuance of its recommendation.
4. It was contested whether the city had established fire limits; and the plaintiff contended that the building had stood for seventeen years without complaint on that account; that there were other

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buildings of like character within the same boundaries, and that even if it were located within these limits, it could not be removed until the owner had had five days' notice, which had not been given. These and the other facts in the case should have been left to the jury.

April 25, 1884

Municipal Corporations. Non-suit. Eminent Domain. Nuisance. Before Judge HAMMOND. Fulton Superior Court. October Term, 1883.

Jane Frank brought an action for damages against the city of Atlanta, alleging that she was the owner of a building situated in the center of a block in that city; that on April 17, 1882, the mayor and general council passed the following resolution:

"WHEREAS, the board of health has adjudged the building in the rear of No. — Decatur street, owned by Mrs Jane Frank, a nuisance, and recommend that the same be removed; and, whereas, the same was erected in violation of the law prohibiting the erection of frame buildings in the fire limits:

Resolved, that the recommendation of the board of health be adopted, and that the proper authorities be instructed by his Honor, the mayor, to have the building torn down and removed at once."

That the city marshal ejected the tenants of plaintiff and nailed up the building, and subsequently tore it down and destroyed the materials, or rendered them worthless, and subsequently reported his action to the mayor and council, which report was received by them; that the board of health had not, in fact, made any such recommendation, and the building was not, in fact, erected in violation of law; that the resolutions were untrue, and so known to be by the mayor and council; and that the real object was to injure and disturb plaintiff.

Defendant pleaded the general issue.

The evidence for the plaintiff was, in brief, as follows: She owned the building in dispute, it was used as a tenement house, and was located in the interior of a block, and about one hundred to one hundred and fifty feet from the

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nearest streets; it was approached by a private alley or pass-way belonging to her, and running to the house from one of the surrounding streets. The house was built in 1865. It was a wooden building near the centre of the city, but there were other wooden structures as near in as that, and several of them built near the same time. Plaintiff testified that she did not know where the fire limits were; but that the city never made any objection to the building of the house because it was not fire-proof, or because it was in the fire limits, and never gave her any notice that they were going to move it on that account, nor of any intention to destroy the house as a nuisance. Some complaint was heard about her tenants, who were negroes. On January 2, 1882, at a meeting of council, the building inspectors reported that the building was in a dilapidated condition and the sills rotten, and recommended that it be taken down. On January 16, the council adopted the report, and ordered the building to be torn down. On February 6, counsel employed by plaintiff, or her agent, appeared at a meeting of the council, and was heard from on the subject of the jurisdiction of the building inspectors over this building, and the council instructed the marshal to suspend work until the next regular meeting. Nothing more was done for some time. Then a case of small-pox in the building was reported to the board of health by a person appointed to inspect by them. The building was testified, by a member of the board of health, to be a nuisance, after the small-pox developed there, but no report was made on it by the board, and the recital to that effect in the resolution was a mistake. On April 17, the resolution set out above was passed; the building was then torn down, and this action was reported by the marshal to the council, who received the report and ordered it filed. The value of the house was variously estimated at from \$300.00 to \$1,000.00.

On motion, the court granted a non-suit, and plaintiff excepted.

Under the charter of the city of Atlanta, the mayor and council have the power

“To elect three building inspectors, whose duty it shall be, in connection with the city engineer, to inspect all buildings and walls located on the various streets, lanes and alleys of said city, when they shall be requested so to do by the mayor, and report the result of said investigation to said mayor and general council, with a recommendation as to the best course to be pursued in reference to said buildings or walls for the protection of the citizens.”

MARSHALL J. CLARKE, for plaintiff in error.

E. A. ANGIER ; W. T. NEWMAN, for defendant.

HALL, Justice.

1. Had there been no disputed facts in this case, and had its determination depended solely upon questions of law, then it should have been disposed of on a motion for a non-suit. *Frank vs. Atlanta Street Railroad Company*, decided to-day.

We think the non-suit wrong in the present instance, because both questions of law and fact were involved in the issues made.

Whether the mayor and general council of the city of Atlanta had authority, upon the report of its building inspectors and engineer, to destroy a building reported as unsafe, but which was not located on any street, alley or lane of the city, is, to say the least, questionable, under §145 of its charter, acts 1874, p. 147. It is urged that they have jurisdiction of this matter for the protection of the occupants of buildings thus situated under the general power and corresponding duty to extend “protection to the citizens.” Sec. 93, City Code of 1879. There is no grant of any specific power to affect this object, that we are aware of, and whether the legislature intended to confer such authority by the general grant relied on, is not quite clear. An application to the general assembly for express power over this subject, and its action thereon,

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would solve the doubt. In the view we take of this case, it is not necessary to decide the question, and we do not rule upon it. We should be reluctant to do so without a fuller argument than that with which we have been favored on this occasion. Municipal corporations, like all others, are confined to the exercise of powers expressly granted, or necessarily implied, and a necessary implication must be so clear and strong as to render it highly improbable that the legislature could have entertained an intention contrary to the implication claimed as resulting from the power granted; indeed, some high authorities go so far as to declare that it must be impossible to impute a contrary intention to the law-making power. Dillon on Mun. Corp., §: 1, 680, notes and citations. As applied to the point in controversy here, *Ib.*, §§683, 1013, notes; 12 La. Ann., 481; 39 *Ga.*, 725; 66 *Ib.*, 195.

2. The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. This court in *D'Antignac vs. The City Council of Augusta*, 31 *Ga.*, 700, 710, announced and enforced the principle, upon abundant authority, cited in the luminous opinion of Jenkins J., who pronounced the judgments, "that, in proceedings by statute authority, whereby a man may be deprived of his property, the statute must be strictly pursued. Compliance with all its prerequisites must be shown." 67 *Id.*, 194, 195. By §146 of the charter (Acts, 1874, p. 147), the party whose building is complained of is entitled to fifteen days' notice, that the objections reported by the building inspectors may be removed. That this requirement of the act was complied with is disputed; the plaintiff contends that, while her counsel appeared before the mayor and general council, and insisted that her building was not so located as to fall under the jurisdiction of the building inspectors, that this

was not the notice required by the charter to be given to her to remove their objections; that, in consequence of this appearance, proceedings upon the report thus made were suspended, and, as she had good reason to believe, were abandoned: that, in tearing down her building, the city authorities did not, in fact, carry out the recommendation of the building inspectors, but acted under a resolution, which recited that the building had been reported by the board of health as a nuisance: this resolution appeared upon their minutes but a short time before the edifice was destroyed. She proved by members of the board of health that no such report as that recited in the resolution had ever been made; and further, that search had been made in the proper place, and the report could not be found.

3. If the house was destroyed to abate a nuisance, then it is very evident, from the uncontradicted testimony in the case, that the proceeding was not in accordance with the defendant's charter (§67, Acts 1874, p. 133), which conferred authority to act and cause such nuisances to be abated as are likely "to endanger the health of the city or of any neighborhood," only upon the report of the board of health, and in pursuance of its recommendation.

4. It was contended, however, if both these defences were unavailing, still this was a wooden structure, and was within the fire limits, and for that reason should be removed. But to this it was replied that there was no proof that the city had established fire limits; that the building had stood where it was for seventeen years, and no complaint had been made on that account; that there were other buildings of like character within the same boundaries that had not been disturbed; and even if it were located within these limits, it could not be removed until she had five days' notice, which it was not pretended had been given as required by §153 of the city charter. All these were facts, and there are others in this record bearing upon the validity of the act in demolishing this house, and shedding light upon the motives and conduct

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of the city's agents in the destruction of plaintiff's property, which she was entitled to have submitted to the jury that she might have them pass upon her right to recover compensation for the wrongs done to her property.

Judgment reversed.

AIKEN *vs.* PECK & ALLEN *et al.*

1. Where a non-suit has been granted, the losing party may either bring his case to the Supreme Court by writ of error, or may, during the term of the trial, move to re-instate the case, and from a refusal of that motion, properly made, may bring the case to this court.
2. In order to foreclose a lien for logs furnished to a saw-mill, there must be a demand on the owner, agent or lessee of the property, at the time when the demand for payment is made preparatory to the foreclosure of the lien. It is not sufficient to make a demand upon former owners of the property, who were such when the logs were furnished, but who have since ceased to be so, and have parted with the possession of the property.
- (a.) Where the only demand made was upon persons who had been the owners of the saw-mill at the time the logs were furnished, but had since ceased to be such, and others had purchased the property and gone into possession, a non-suit was properly granted.

April 25, 1884

Non-suit. Practice in Superior Court. Motion to Re-instate. Liens. Saw Mills. Demand. Before Judge HAMMOND. Fulton Superior Court. October Term, 1883.

Reported in the decision.

M. M. TIDWELL, for plaintiff in error.

MARSHALL J. CLARKE, for defendants.

JACKSON, Chief Justice.

An affidavit to foreclose a lien for saw-logs furnished L. H. Hall & Co. was levied upon a steam saw-mill, and the mill was claimed by Peck & Allen. The affidavit al-

leged that the demand for payment was made on Hall & Co., who "were the owners of the said saw-mill when said saw-logs were furnished by deponent." The proof was, that the saw-mill, when the demand was made, was in the possession of Peck & Allen, whom the plaintiff learned had bought it, and who were running said mill when the demand was made on Hall & Co. On this affidavit, and proof by plaintiff, the court non-suited him, because it did not appear that any demand was made on Peck & Allen, who were in possession on the day the demand was made on the former owners and debtors of the plaintiff. This non-suit was granted on the 8th of October, 1883. On the 18th of December, during the same term, the plaintiff moved to re-instate the case, and set aside this judgment of non-suit. The court denied this motion, and the denial of the motion to set aside the judgment of non-suit and re-instate the case is the error assigned.

1. Two points of law arise : First, was the motion to re-instate in time ; and secondly, if it was in time, was it right to re-instate on the merits ? The motion to re-instate, though made at the same term during which the non-suit was awarded, was not made until more than sixty days after the non-suit was granted, and, inasmuch as the plaintiff could not at that time sue out a writ of error to this court, it is insisted that he could not move to re-instate the case, and in that indirect way bring the points of error then made, if at all, to this court for correction. In 54 *Ga.*, 476, Judge McCay held, for himself alone, that a motion to set aside a judgment, after such delay, at a subsequent term, should not be entertained, for reasons of this sort, which are forcibly presented in his opinion, but Judge Trippe, who concurred in the denial of the motion to re-instate, does not seem to concur in this reasoning, as Judge McCay speaks alone for himself in that course of reasoning; and Chief Justice Warner dissented from the judgment, reasoning and all. The general rule is, that a motion to arrest or re-instate may be made at any time during the term, and a motion to set

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aside at a subsequent term within the statute of limitations, regardless of the omission to sue out a writ of error within sixty days from the time the error complained of was committed. A motion for a new trial, though based entirely on errors of the court during the trial, may be made any time during the term, though sixty days have passed since they were committed, and though the losing party could have sued out a writ of error here, within the sixty days, upon those errors.

It would seem, therefore, that the losing party has two remedies in all such cases, to-wit: to come up at once to this court by writ of error, or to try the court below first on any legitimate motion before that court, enabling it to review its own judgments first, within the time fixed by the statute of limitations, and upon that more deliberate ruling to except and bring the cause here. Code, §§3588, 3589.

2. But the motion to reinstate being at the same term and in time, was its denial right? That question must be answered by another, was the non-suit right? If so, of course a right judgment ought not to be set aside and the case re-instated. And the judgment to non-suit was right, if a demand for payment on the party who owned the steam saw-mill, preparatory to foreclosure on the saw-mill, was necessary. The proceeding is summary; it is *in rem*; it authorizes seizure and sale of the property; and it is but reasonable that some sort of notice be given to the party in possession of the property, and then using and running it as his own. And such seems to be the meaning of the statute. Section 1991 of the Code declares that, to foreclose and seize and sell such property under this lien, "there must be a demand on the owner, agent or lessee of the property for payment, and a refusal to pay, and such demand and refusal must be averred," and of course, on trial, proved. The statute does not say on the debtor, or on the owner when the debt was contracted, but on the owner. When the owner? What owner? Not one once

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the owner, long ago—six or nine months before foreclosure,—but the owner when the demand for payment, preparatory to foreclose on the property, is made.

And so this court has ruled, on a statute using the same words as this section 1991 does in 45 *Ga.*, 159; and subsequently in 54 *Ga.*, 137, it has so construed this statute itself. In the case before us, on the very day that the demand was made on the former owners, the plaintiff was at the mill, and saw Peck and Allen in possession, and running the mill, and then learned that they had bought it, and yet neither averred in his affidavit to foreclose that he demanded payment of them, but averred that he made it on those who were the owners when the debt was contracted, nor did he prove that any demand was made on those thus in possession of and running the mill as owners of it then, nor on any agent or lessee of theirs. So the nonsuit was right, and the motion to re-instate was properly refused.

Judgment affirmed.

SIMS et al. vs. HUTCHESON et al., Road Commissioners.

1. Prior to the act of 1881, it was sufficient to post notice of the place of meeting of road commissioners of a district for fining defaulters, under §626 of the Code; and a notice having been thus given before the passage of the act of 1881, was not affected thereby.
2. Where notice was given, and the defaulter attended the commissioners' court, the fact that the court was held within, instead of after, twenty days from the road-working, did not render it invalid. Mere irregularities in this species of court do not matter.
 - (a.) This is unlike a justice's court.
 - (b.) Semble that section 638, par. 3 of the Code, should read "within," instead of "after" twenty days.
3. A notice to work on the road need not be in writing; if the person notified received the notice, and was told by the overseer when and where to work and what tools to bring, and actually appeared, that was sufficient.
4. Where a person was notified to work the roads on the day before he was required to appear, and did not appear thereunder, this was sufficient, although he was not notified twenty four hours before

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what would be the usual hour for beginning labor on the next day.

5. When the person so notified appeared late, and was directed to go to work, but would not, and went home, apparently because the overseer threatened to report him for tardiness, this was no reason for such conduct.
6. Where the commissioners' court fine a defaulter, the fine may be enforced by execution or by imprisonment

May 13, 1881.

Roads and Bridges. County Matters. Notice. Courts. Before Judge POTTLE. Oglethorpe Superior Court. October Term, 1883.

Moses Sims filed his petition for a *certiorari* to the judgment of a road commissioners' court against him as a defaulter. The answer of the commissioners showed, in brief, as follows:

On September 21, 1881, the road overseer returned Sims and certain others as defaulters, at a working of the public roads on September 20. Thereupon the district commissioners issued a written notice, directed to the defaulters reported, and posted it at the post-office and two other public places in the district,—at two of them on September 24, and at the other a day or two later. This notice called on the defaulters to appear at a commissioners' court to be held on October 5, and on that day it was held. Sims and the others appeared and urged the following excuses:

(1.) That they were improperly warned or summoned.

(2.) That they were not allowed to work by the overseer after their appearance.

(3.) That they were not served with a written notice by a constable or road overseer three days before the commissioners' court, and did not waive notice.

One of them also claimed to be under age.

The evidence showed that, about two o'clock on the day before the working of the road, the overseer notified Sims and the others verbally of the time and place of meeting, the road to be worked and the tools they were to

bring. The defaulters did not appear till between nine and ten o'clock, some two or two and a half hours after the other hands had commenced work. The overseer told them to go to work, and he would only return them for the lost time. Thereupon they did not go to work at all, but left and returned home.

Sims was fined \$3.00. One Williams gave notice that he had a landlord's lien on all the goods of the defaulters. The commissioners thereupon issued a warrant against Sims, requiring his imprisonment for ten days, but the answer to the *certiorari* showed that the privilege of release on payment of the fine was allowed. Sims thereupon applied for a *certiorari*.

The court dismissed the *certiorari*, and Sims et al. excepted.

W. M. HOWARD; J. C. REED; SAMUEL LUMPRIN; J. J. ECKFORD, for plaintiffs in error.

J. W. ECHOLS, for defendants

JACKSON, Chief Justice.

The judge of the superior court, on a *certiorari* to the road commissioners, sanctioned their action in fining the plaintiff in error, and when he refused to pay it, in sending him to jail for ten days. Error is assigned on that judgment.

1. The notice was legal at the time given, it being posted according to the Code, §626. The act of 1881, altering the mode of notice to personal notice, was passed after this notice was given under that section.

2. The commissioners' court was held within twenty days, instead of after, as the Code reads, section 658, par.

3. The important point is, did the defaulter have notice, and was he there? If so, in this sort of court all mere irregularities do not matter. This road court is wholly unlike the justices' courts under the constitution of 1868,

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where the time fixed was of the essence of the jurisdiction of the court. Hence, the cases cited in respect to those courts, as then organized under that constitution, have no application to the meeting of road commissioners to punish defaulters. Besides, the better construction of section 658 would be, perhaps, within twenty days. The time within which excuses were to be rendered by defaulters, under the act of December 13, 1818, section 5, Cobb's Digest, p. 948, was within twenty days. The codifiers put it "after twenty days," but the act itself "within twenty days." There is better sense in reading it "within" instead of "after." "After" is wholly indefinite. Six months, a year, would be after the default; "within" would have the matter fresh in memory, and easily determined.

But it is immaterial, where notice was given and the party attended.

3. The notice to work need not have been in writing. Code, §§ 614, 615. Neither the act of 1818, nor the Code expressly requires it. This plaintiff in error got the notice and was told by the overseer when and where to work, and what tools to bring. When he appeared, that answered all the purposes of the notice.

4. He was notified the day before. The statute says one day. True, it was not as early in the morning as would make twenty hours before the time people ought to begin a day's work in the morning: but the day before answered the purpose and brought him there. Code, §614.

5. When he got there late, he was directed to go to work, but would not, and went home, it seems, because the overseer threatened to report him for tardiness. What sort of reason was this for such contumacy?

6. This court has held that if the fine was not paid, imprisonment was legal, and so is the Code, §619.* It may be enforced by execution or by imprisonment, or the defaulter may be punished by fine or jail. If paid at any time, the imprisonment was to cease in this case. The

* See 70 Ga., 407

Code also declares that execution or other process may be issued against the convicted (Code, §658, par. 3), of course to enforce the fine. The objection raised is that the punishment was changed. The record shows that it was simply enforced.

Judgment affirmed.

PRICE vs. THE STATE OF GEORGIA.

1. Where a husband and wife had separated, the wife returning to her father, and the husband was killed by the father while the former was approaching the house of the latter at night, in company with another, it was admissible to show that the husband obtained his companion to accompany him, and stated to such comrade that he had good news from his wife, and wished to meet her and see the defendant and family, with a view of taking her back to his own home, and that his adventure was peaceful, and he meant no harm, having received a letter from his wife to meet her. Such statements were part of the *res gestæ*.
2. The difficulty between the defendant and deceased having arisen out of the domestic troubles of the deceased and his wife, and the latter having left his house for that of her father (the defendant) riding horseback behind another man, it was admissible to show that this man was seen in a private and hidden place about a hundred and fifty yards from her father's house, taking improper liberties with her.
3. That the preliminary examination of a physician as to the physical condition of the deceased, to show whether or not the latter was *in articulo mortis*, made with a view to ascertain whether dying declarations were admissible, was conducted in the presence of the jury, was no ground for a new trial, where none of the declarations themselves were elicited, and none were stated.
4. Attacks on the character of a witness by showing contradictory statements may be rebutted by proof of general good character for truth and standing in society.
5. Where the question before the jury involved an attack on the person as well as on the habitation or property of the accused, it was the duty of the court to charge the law touching the defence of person and of habitation, and in regard to the kind of homicide, whether murder, manslaughter or justifiable homicide, and when the law, in respect to each phase which the facts in the case warrant, is fully and clearly explained in the charge it is no ground for a new trial.

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6. The charge was full, clear and explicit, and fairly presented the defences to, which the defendant was entitled.
7. If the deceased was a mere trespasser, with no evil intent, he was entitled to be warned off; and then if he did not leave, that degree of force necessary to make him leave could be used. Such, in substance, was the charge.
8. Where jurors are attacked, they may repel the attack by counter-affidavits.
9. The verdict was not contrary to law or evidence

May 13, 1884.

Criminal Law. Evidence. *Res Gestæ*. Practice in Superior Court. New Trial. Impeachment. Before Judge CARSWELL. Johnson Superior Court. September Term, 1883

Warren Price was indicted for the murder of Romanus F. Perry, alleged to have been committed on August 27, 1882. The evidence for the state was, in brief, as follows: Perry was the son-in-law of Price. After a brief married life, lasting only a few months, Perry's wife left him, and returned to her father's house, which was several miles distant from that of her husband. She went thither riding on horseback behind one Mandel Powell, who was the disturbing element between the husband and wife. After this, she was seen with Powell in a sunken place, which the witnesses termed a pond, not very far from the house of her father, and he was seen embracing her. The witness who testified to the transaction did not see any other impropriety; but a warrant was sued out against Powell by Perry for fornication and adultery. Some two or three weeks thereafter, Perry asked one or two of his neighbors to go with him to Price's house. He told one Willoughby that he had good news from his wife, and asked him to go. The latter being unable to do so, Perry turned to one Tharp, who was standing by, and asked him to go, saying that he had good news, and wanted to see his wife, and wanted to talk with her and her father and mother; also that he wanted his wife to come home with him. He also

said that he wanted some one along; that he did not want any fuss. Tharp consented to go, and they started before sundown, but were detained by a shower, and reached the vicinity of Price's house between eight and nine o'clock. They strayed somewhat from the way, although Perry had been there several times. They approached the house a hundred yards, or thereabouts, from the gate, by a trail or old path, and, reaching the enclosure around the farm, got over it, and went towards the house, between a corn and cane patch. As they entered the enclosure, a dog began to bark. Tharp said he did not reckon the dog would come down there. Perry replied, no; that they walked a little light until they got near enough to hail; that he expected his wife every minute, and wanted to see if Mandel Powell was there. They proceeded on tiptoe, and arrived within twenty-five or thirty yards of the house, walking along the edge of the cane patch, when Price fired upon Perry with a single-barrelled shot-gun, loaded with shot and a bullet. Perry fell to the ground, and Price said, "I reckon I have got him now," this remark being made to his family, who came out after the shot. Some shot from Price's gun also wounded Tharp, but he was not conscious of it at the moment. He stooped over Perry, who murmured something about "kill." Tharp looked up, saw Price with his gun, and, thinking he would next be shot, ran away, and subsequently discovered that he also was wounded. He then went to the house of Perry's mother, and, in order not to frighten her, told her that he thought Perry had shot him accidentally. Powell was at the house of Price on the night of the homicide, and was made a witness for the state. (The name of this witness is, in the record, "Manson Powell," at the head of his testimony.) He testified that he was in bed when the shot was fired, but arose, put on his pantaloons, and went out on the piazza, where he found Price, his daughter, and the balance of the family; that he heard Price say, "Oh, yes, I reckon I have got you now;" that he went out to where

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Perry's body was lying, and found him lying on his right side; that there was a pistol lying on his coat-tail, outside of his pocket. Tharp testified that, shortly before reaching the fence, Perry pulled a pistol out of his pocket, and said, "Mr. Tharp, I have got my pistol; I don't mean any harm by it;" and then put it back in his pocket, that the witness saw no more of it, and that Perry did not have it out at the time of the killing. After showing the pistol, he offered Tharp a drink of whiskey from a flask which he had.

One Weeks, a witness for the state, testified that before the day of the killing, Price's little child had a bullet rolling it about; that Price took it from the child, saying that he did not have any large shot; that "there is somebody creeping around my house of a night, and I will creep into them." Price asked Weeks if that would kill anybody. Weeks inquired who he wanted to kill, and Price replied, "Perry," and told Weeks to tell Perry not to come there any more; and this message was communicated to Perry. The same witness testified that, during the day of the homicide, Perry was at his house and said, "he was going up ahead to see his sweetheart," and when asked whom he meant by his sweetheart, replied, "You know." He also slapped his pocket, and said that he had good news in it. This occurred about sundown. Another witness testified that she thought she saw Perry go to his satchel before leaving home on the Sunday evening before he was shot, and that subsequently she found in this satchel a note, which was put in evidence. It was unsigned, but read as follows:

"Mr. Perry:—I seat myself to drop you a few lines to let you know that I want to see you. I want you to come just as soon as you can come, and carry me home, if you please. If you do, go by the house and take the right-hand at the end of the lane till you go across the branch. When you cross the branch, then stop till I come. I will be there."

Another witness testified to conversations with Price after the shooting, in which he said, in substance, that, on

the night of the homicide he lay down on his bed; that he seemed to be restless; got up, lit his pipe, and, going out on the piazza, sat down near his door in a chair; that, after sitting there some little time, he looked around and discovered some person near his house; that he reached up, got his gun, and shot him. The witness who testified to this stated that he asked Price if he was expecting Perry there on the night of the homicide, and he replied that he was expecting him at any time. Defendant also said that he had heard threats made against him. Experts testified that, from the nature of the wounds inflicted on Perry, he could not have had his arm extended at the time of the shooting, but must have been in a slightly stooping posture.

The evidence for the defendant was, in brief, as follows: After Mrs. Perry left her husband and returned to her father's house, Perry published in a newspaper a card, charging that his wife had eloped with Mandel Powell, and had gone to the house of her father; that she and Powell were on terms of improper intimacy, and that her father and mother were cognizant of the fact, and were abetting her in her conduct; that, on discovering her absence, he had attempted to see her at her father's, but Price had told him to leave—no one wished to see him; that he had treated her kindly, and had given her no cause for this conduct. This card was dated July 11. On August 3, Perry went into a field, where two nephews of Price were working, for the purpose of seeing one of them, and while there, he threatened that, whenever he caught Price, he would whip him, expressing his intention in very vulgar and indecent terms. These threats were subsequently communicated to Price. Price stated to his brother, who was a witness for the defence, that, on August 16, Perry rode along the outside of his fence and fired five times with a pistol as he rode. He told the witness to go and tell Perry to stay away from his place, for if he caught Perry slipping around his house at night, he would shoot him. This was communicated to Perry

he endeavoring, or manifestly intending to commit either of these offenses against Mr. Price, his property or habitation, and was the killing of Mr. Perry necessary at the time, in order to defeat him from carrying out that intention or endeavor. Was it necessary to do that—to kill him—in order to prevent him from carrying out his manifest purpose or intention of committing a felony? Of committing violence on his person, which would amount to a felony? Or an offense against his habitation or property, which would amount to a felony? If that was his intention, and he was manifestly endeavoring to do that at the time he was killed, that would justify him (Price) in killing him.”

(9.) Because the court charged as follows: “Our statute goes on further, and says that a man is not justified in killing another from the bare fear that he is going to commit these offenses. A man must not kill another because he has a bare fear of danger. The danger must be imminent, and he must not act upon imaginary fears. He must act under the fears of a reasonable man that these offenses are about to be committed on him. If he was actuated by the fears of a reasonable man, that the man who was killed was about to commit a serious personal injury upon him or his property, the law don’t require him to wait until these things are done; but if he was actuated by the reasonable fears of a courageous man, that either of these offenses was about to be committed on him, he is authorized to act under these fears, and kill his assailant. But they must be reasonable fears. A man must have some justification for such a fear. He must not act upon a bare imaginary fear—seeing a man coming up to his house who has no hostile intention to him at all, and just imagine that that man is about to commit a serious personal injury on him, or an injury on his habitation or property; and if he did so, he would not be justified in killing him.”

(10.) Because the court charged as follows: “You

must examine into the case, and see whether the circumstances surrounding Mr. Price, at the time he shot Mr. Perry, were sufficient to excite the fears of a reasonable man. Did he act upon a bare imaginary fear, without sufficient justification? Did he act upon a bare imaginary fear, and shoot down an innocent man who was going to his house on a peaceful errand? If he did kill a man who was going there on a mission of peace, and who harbored no hostility to him or his habitation, he would be guilty of murder."

(11.) Because the court charged as follows: "If, on the contrary, from what had previously occurred between him and Mr. Perry, and from the surrounding circumstances at the time of the killing, you find they were sufficient to justify the fears of a reasonable man, that Mr. Perry was there to commit a serious personal injury upon him, his habitation or his property, and it was necessary to kill Mr. Perry, in order to prevent the consummation of these offenses, then it would not be a case of murder, but one of justifiable homicide."

(12.) Because the court charged as follows: "It is insisted that, in no view, was Mr. Price authorized to kill Mr. Perry without warning or remonstrance. Well, upon that subject I charge you this: A man has a right to prevent unpleasant people from coming to his house or premises. A man's premises are under the protection of the law, and persons who are disagreeable to him have no right to invade his premises, although their mission be not hostile. He has a right that he be relieved of such persons; and when a man gives another notice that he must not come upon his premises, that he will no longer tolerate his being there, and the person goes there, though not upon a hostile mission, he is what is termed in the law a trespasser upon the premises. If he goes there from motives of hostility against the person, or his habitation or his property, that party has a right to protect himself to the extent I have stated. But if the party who was notified not to

go there, does go there, even not with hostile intention, he is a trespasser, and the owner of that house and the premises, who has so notified him not to come there, has a right to eject him. He has a right to require him to leave his premises, and if the trespasser declines to do so, he is authorized to use whatever force is necessary to eject him. He is not justifiable in shooting him down simply because he is a trespasser. He must tell him to leave; that his presence there is objectionable; that he is not wanted there; and if the trespasser refuses to leave, he is authorized to use so much force as would be necessary to eject him from the premises."

(13.) Because the court charged as follows: "In conclusion, let me say to you, that your position imposes very grave and responsible duties upon you. Upon the one hand, you have in your charge, I might say, the life of the prisoner and his destinies hereafter. On the other hand, you have in your charge the highest and greatest interests of the state in the enforcement of the law and the protection of society. All the great interests involved in the enforcement of the law in this country are intrusted to your charge in this case."

(14) to (16.) Because of bias on the part of certain of the jurors. [In support of this ground, several affidavits were introduced to show remarks made by four of the jurors indicating prejudice against the defendant. A counter-showing was made, and the jurors denied making the statements attributed to them. Three of them made positive denials, and the fourth stated that he had no recollection of any such conversation or statements, and that, if he made any remarks concerning defendant, they were not expressions of his opinion or bias, and that he had no bias, and assented to the verdict rendered solely from a sense of duty, under the law and evidence.]

The motion was overruled, and defendant excepted.

H. D. D. TWIGGS; HINES & ROGERS, for plaintiff in error.

C. ANDERSON, attorney general; R. L. GAMBLE, solicitor general; A. F. DALEY; J. M. Stubbs, for the state.

JACKSON, Chief Justice.

Warren Price was found guilty of murder; moving for a new trial, it was denied him by the presiding judge; to that denial he excepted, and the case is here for review. The wife of deceased had left him and gone back to her father's house, riding on horseback behind a man who seems to have been intimate with her to an extent unbecoming wifely modesty. Price, the defendant, was that father, and the difficulty between father and husband arose out of alienation of good will on account of this domestic trouble, and eventuated in the homicide by the defendant, on the occasion of an effort by deceased to see his wife and take her home, in response to a letter from her, which he stated to the friend accompanying him he had received from her, and had in his pocket. He reached the farm of the defendant after night-fall, and approached the house by a route through an obscure path between a corn and cane patch, and was shot down by Price from the portico of the house, when some distance from it, but within gun-range, he and his friend approaching at the time, or stopping at the moment to survey the surroundings and take a reckoning of the position, a dog having barked at the moment. The questions of law made on the motion for a new trial will be reviewed and determined now by us, after having closely scanned the evidence fully reported by the reporter at the head of this opinion.

1. The deceased, after an effort to get one or two other persons to accompany him on his visit to Price's house, where his wife was, got a man by the name of Tharp, with whom he had lived, to accompany him, to whom he stated that he had good news from his wife, and he wished to meet her and see Price and the family, with the view of taking her back to his own home, and that his adventure

was peaceful, and he meant no harm, having received a letter from his wife to meet her. These statements were parts of the act of going, of the *res gestæ*, and were properly admitted. *Johnson vs. The State*, this term; 67 Ga., 460.

2. The state proved that the man with whom the wife of deceased left his home for her father's, was seen in a dry pond, a private and hidden place, some hundred and fifty yards from her father's, taking improper liberties with her. Defendant assigns error also on the admission of this testimony.

Viewing this circumstance in connection with the nature of the trouble which was the exciting cause of the unfortunate and bloody catastrophe, of the wife's desire to return home with her husband, expressed to him, as he informed the witness in the very act of going to the scene where he fell; of the husband's right to condone any offense of the sort which she had committed, and receive her again as his wife, and of all the other circumstances of this transaction, from beginning to end, which cluster around the wife and daughter as the central figure in the drama, we see no trouble in sustaining the court in letting it go to the jury, as shedding light upon that scene, and showing motive in deceased to desire to rescue his wife from the continued efforts of her paramour to prostitute her further. This whole case would be as obscure in reaching the truth of motive and conduct in the parties to the tragedy, if the woman who caused it were left out of view,—if her character and conduct at her father's and around it with the man who took her there, were not exhibited to the jury, as the great epic of Homer, the Siege of Troy, would become, if Helen were stricken from its leaves. The evidence was relevant, and bore right on the bull's eye of the case.

3. It is again objected that the court permitted the doctor to be examined in presence of the jury, in respect to the condition of deceased,—whether or not he was *in ar-*

ticulo mortis, with a view to ascertain whether his dying declarations were admissible. Not a word of statement of the deceased, touching this transaction, was elicited. The jury heard nothing at all from the lips of the deceased about the killing, or what led to it, or had aught to do with it. That point was not reached, but after examining the doctor on his condition, whatever statement the deceased had made perished with him, and was heard by nobody in court. Yet the objection is made on the authority of *Hall vs. The State*, 65 Ga., 36, that a new trial ought to be granted, because the doctor's preliminary examination, which elicited nothing touching the merits of the case, was heard by the jury. To what extent is that case to be carried? Certainly nobody will insist that it covers the point here. For my own views respecting its true limits, as designed by the then court, of which I was a member, and as intended to be limited by Judge Crawford, see my dissenting opinion in *McDonald vs. The State*, last term. Besides, this case is one of dying declarations, not confessions of the accused. See 17 Ga., 465, 6th head-note and p. 484.

4. The Code, as well as repeated rulings of this court, affirms that attacks on the character of a witness by contradictory statements may be rebutted by proof of general good character for truth and standing in society. Code, §3575.

5. Where the questions before the jury involved an attack on the person as well as on the habitation or property of the accused, it was the duty of the court to give the jury the law touching defence of person and of habitation, and in regard to the kind of homicide, whether murder, manslaughter or justifiable homicide; and when the law, in respect to each phase which the facts make in the case, is fully and clearly explained in the charge, of course it is no ground of error on which a motion for a new trial can successfully rest.

6. The charge of the court, in this case, is full and clear.

It fairly presents the several defences to which the accused was entitled. It is explicit, to the effect that, if from all the circumstances which had surrounded the accused and deceased from the inception of this difficulty to its bloody consummation, the defendant was actuated by the fears of a reasonable man, that deceased "was there to commit a serious personal injury upon him, his habitation or his property, and it was necessary to kill Perry in order to prevent the consummation of these offenses, then it would not be a case of murder, but one of justifiable homicide," and in addition, it calls the attention of the jury to section 4334 of the Code, which declares that "all other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide," and charges "that they are left to the enlightened conscience and reason of the jury;" and then it emphasizes this section, repeating its language, and tells the jury that defendant's counsel "invoke it as covering his case," and repeats, "that is a matter which rests entirely with your enlightened consciences and reason. You have heard the law of manslaughter and justifiable homicide, and if, after a calm, impartial and rigid investigation of all the testimony in the case, you find, under your consciences, that Mr. Price was justifiable, outside of the law of homicide, as given to you, and you think it is a case that stands upon the same footing of reason and justice as a clear case of justifiable homicide, then you are authorized to acquit him." Add to the above a distinct charge of the presumption of innocence, and the degree of evidence beyond a reasonable doubt as necessary to convict, which immediately follows, and the conclusion is irresistible that the presiding judge held the scales of justice in a merciful hand.

7. If the deceased was a mere trespasser, with no evil intent before and at the time he was shot down, he was entitled to be warned off, and then, if he did not leave, that degree of force necessary to make him leave may be used. This, in substance, is the charge of the court on this point,

and we think it the law. 17 *Ga.*, 465; 58 *Id.*, 35; Russell on Crimes, 519

8. Surely, it needs no authority to show that when jurors are attacked, they may repel the attack by counter-affidavits. See Georgia Reports *passim*. This attack was fully and successfully repelled and overcome in this case.

9. The verdict is not contrary to law or evidence. If the deceased was not decoyed to that house that night for the purpose of killing him, it is quite certain that a deliberate purpose to kill him, whenever he came there, dwelt in the heart of the accused. The gun was loaded for that purpose; the very ball which alone would have done the work, was taken from a child playing with it, and put in the shot-gun, with that intent; the other shot in the gun would have done the work, and according to the doctor, the wounds they made were equally fatal; the exclamation of accused, "Ah, I have got you at last," as he saw, in the clear moonlight, the young man fall, is as clear evidence of purpose long meditated as the large ball that he took from the child, and to make the killing sure, rammed in the gun with the smaller shot, and showed that to wound, to frighten off, to repel an intruder, were not enough to satisfy the accused, but sure work, the work of death, was in his heart. He expected him. To some witnesses he said every night, to another, especially that night he said he expected him. Why especially that night? Was the decoy duck his contrivance? Was the "good news" the poor fellow said he got from his wife sent within his knowledge, and therefore did he expect, and was he on the lookout for him? These are questions which, under the facts proved, the jury may have answered in the affirmative; and if that be the truth, the murder has no extenuation. Or, it may be, that the words, "especially that night," can be explained on some other hypothesis; if so, then was he in danger as to personal hurt? Did deceased have his pistol out or pointed? It is clear that he did not. Was there danger to his habitation? Another man was in the

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house with him, and surely the two could have protected it, if attacked; but no attack was made upon it.

So that, at best for defendant, he shot, and shot to kill, and did kill, without a single word of remonstrance or caution, or warning, when it is not shown that his person or habitation was endangered at the time. And his eye was so keen and his nerves so steady that moonlight was as good as daylight would have been, to execute his purpose. The man against whom revenge was in his heart was killed, and the other accompanying him was wounded, and he left the body of his friend in the hands of the slayer and his family and of the friend lodging that night in the slayer's house. How easy to take the pistol of deceased out of the pocket and put it by him? How easy to take out of his pocket the note of his wife which decoyed him to his death? Be all this as it may, in the eye of Him whose all-seeing eye is over every scene, certain it is that this court has no power, in law, to adjudge either that the jury did wrong in finding defendant guilty, or that the judge did wrong in upholding the verdict.

Judgment affirmed.

McCALLA vs. SHAW.

Where two were jointly sued for malicious arrest and false imprisonment, and the act on which the suit was predicated was the joint act of the two, each was responsible for the entire recovery, and a verdict for \$300 general damages against one of the defendants and \$100 against the other, was illegal, and should not have been received.

- (a.) Section 3075 of the Code, providing for the apportionment of damages by the jury, where several trespassers are sued jointly, has reference to trespasser committed on property, and not to an action for a personal tort.
- (b.) A new trial having been granted to that one of the defendants against whom the jury found \$100.00, and the liability and responsibility of the two being the same, the other defendant was also entitled to a new trial.

April 25, 1884.

Torts. Damages. Parties. Verdict. New Trial. Practice in Superior Court. Before Judge HAMMOND. Fulton Superior Court. April Term, 1883.

Reported in the decision.

A. C. McCALLA; G. W. GLEATON, for plaintiff in error.

BLACK & ALBERT, for defendant.

BLANDFORD, Justice.

Shaw brought his action against W. E. McCalla and J. N. Stewart for malicious arrest and false imprisonment. The jury returned a verdict for four hundred dollars general damages; three hundred dollars against McCalla, and one hundred dollars against Stewart. The defendants, McCalla and Stewart, moved the court for a new trial, upon several grounds. The one mainly relied on here is, that the verdict is illegal, and should have been rendered against both defendants for the same amount. The court granted a new trial as to Stewart, but refused the motion as to McCalla, and he excepted, and brings the case here for review. The Code, §2992, says: "If the imprisonment be the act of several persons, the party may sue them jointly or separately; and if jointly, all shall be responsible for the entire recovery. In the case of *Simpson vs. Perry*, 9 Ga., 509, the rule was stated by Warner, J., in an action for joint tort against several defendants. "The jury are to assess damages against all the defendants jointly, according to the amount which, in their judgment, the most culpable of the defendants ought to pay," and cites 2 Greenleaf Ev., §277. That case was an action against two defendants for an assault and battery. The jury found two hundred dollars against one of the defendants, and one hundred dollars against the other defendant. The court construed the verdict to mean that the jury found two hundred dollars against both defendants, and that such was the legal effect

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of the verdict, and reversed the judgment of the court below, and directed the verdict be amended so as to conform to the ruling of the court in that case.

But the defendant in error insisted that section 3075 of the Code controls this case, in which it is provided that "when several trespassers are sued jointly, the plaintiff may recover against all, the greatest injury done by either. But the jury may, in their verdict, specify the particular damage to be recovered of each." We think that this section refers to trespasses committed on property, and not to such a tort as is set forth in the declaration of defendant in error. We think that the court should have refused to receive the verdict rendered in this case, and he should have instructed the jury that, if they found damages of three hundred dollars against McCalla, then they should find the same amount against Stewart, as they were jointly liable and responsible for the entire recovery. Code, §2992.

If this direction had been given by the court, it would seem to follow that if Stewart was entitled to have a new trial, as was awarded in this case, then McCalla should likewise have had a new trial, as his liability and responsibility were precisely that of Stewart, in this action.

Let the judgment of the court below, refusing the new trial, be reversed.

DORSEY *et al.* vs. ANSLEY *et al.*

In all cases where an application is made for leave to file an information in the nature of a *quo warranto*, the presiding judge may look to the relations which the parties applying sustain to the matter to be inquired into; and if the facts show that the applicants have been guilty of such conduct as precludes them from making the inquiry, they will be estopped, and their application denied.

(a.) The charter of a town provided for an election for councilmen on the third of January; under a mistake of law, the council, then in office, ordered an election to take place on January 7, and it was so advertised for ten days; at the election, four of the then incu-

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bents and one other person (who are the relators) offered themselves for election and were defeated, all or nearly all of the voters of the town taking part in the election; two days afterwards, the incumbents ordered another election to take place on the 14th of the month; this took place after five days' notice; only seven votes were cast, and relators were elected:

Held, that the relators are estopped by their conduct, and an application from them for leave to file a petition in the nature of a *quo warranto* was properly refused.

April 15, 1884.

Municipal Corporations. *Quo Warranto*. Estoppel. Before Judge FAIN. Bartow Superior Court. January Term, 1884.

Reported in the decision.

GRAHAM & GRAHAM, for plaintiffs in error.

M. R. STANSELL, for defendants.

BLANDFORD, Justice.

The plaintiffs in error filed their petition, asking for leave to exhibit an information in the nature of a *quo warranto* against the defendants in error, who were exercising the functions and offices of councilmen of the town of Taylorsville, in which they alleged that respondents had been elected such councilmen on the seventh day of January, 1884, which election was illegal, as they alleged, because by the charter of said town, the election should have been held on the first Thursday in January, 1884, which was the third day of that month; and that they were elected at an election held, after due advertisement, on the 14th day of January, 1884.

At the hearing of this petition, it was shown that the election, held on the 7th day of January, was by order of the then board of councilmen, and the same was advertised for ten days; that four of this board and one other person, who are the relators, were candidates for election

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to the office of councilmen, and were voted for; that respondents were also candidates and were elected. This election was full—nearly all, if not all, the legal voters participating therein. Two days after this election, the old board of councilmen, four of whom had been candidates for re-election and defeated, ordered another election to take place on the 14th of January, five days' notice being given of this election. At this last election, the relators were elected, only seven persons voting at this election. Under these facts, the presiding judge refused the application, and dismissed the same. This ruling of the court is excepted to, and error is assigned here on said exception.

We think the judge was right, under the facts of this case, to refuse the information. While the law required the election to be held on the first Thursday in January, yet when the council, under a mistake of the law, directed an election to be held on the 7th of January, four days later than that fixed in the charter, but this election was held under ample notice, fairly, in which the voters of the town participated, no objection being made by any one, and the relators themselves being candidates, four of whom ordered the election, public policy requires that they should be estopped from contesting this election.

While the public are interested in the question as to who should exercise a public office, these relators, who claim these offices, are by their own acts estopped from denying the legality of the election of respondents; and in all cases where an application is made for leave to file an information in the nature of a *quo warranto*, the presiding judge may look to the relation which the parties applying sustain to the matter to be inquired into, and if the facts show that the applicants have been guilty of such conduct on their part as precludes them from making the inquiry, they will be estopped and their application denied. Code, §782 *et seq.*; 63 *Ga.*, 592, 207; 44 *Ga.*, 497; High, 629;

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33 N. J. L., 195; 88 Ill., 537; Dillon Munic. Cor., Sec. 899, 900; 3 Tenn. R., 573; 4 *Id.*, 223; 1 East, 38; 1 Barn & Adolph., 684, 690.

Let the judgment of the court below be affirmed.

SLUDER vs. BARTLETT.

1. Although this court disapproves of the practice of incorporating original papers in the brief of evidence filed with a motion for new trial, yet where counsel for defendant in error have agreed in writing to such use, and the brief thus made has been approved by the presiding judge, the writ of error will not be dismissed. Parties who have agreed to such use of the records stand in *pari delicto* with those so using them, and cannot urge its illegality, on a motion to dismiss the writ of error.
 - (a.) The papers are identified by the approval of the presiding judge, the transcript of the record certified and sent up to this court is regular, and it is doubtful if this court can go beyond this in discovering irregularities. The transcript on which the case is tried being full and apparently regular, the presumption is in favor of the court below.
2. Where one claims to be a *bona fide* purchaser with four years' possession, in order to relieve land from the lien of a judgment, the fact that he purchased with notice of the judgment does not constitute him a wrong-doer. He may be, notwithstanding this knowledge alone, a *bona fide* purchaser. Yet this may be looked to, in connection with other facts, in determining whether the purchase be *bona fide* or not.
 - (a.) If it be shown that such purchase was made to hinder, delay and defraud the creditor, or the circumstances show that such purchase was not made in good faith, but for the purpose of taking an undue advantage of the creditor, then he would not be a *bona fide* purchaser; but when a valuable consideration has been paid for the property, and the purchaser has entered into possession of the same as his own, and held for four years, then it is discharged from the lien of any judgment against the person from whom he purchased, notwithstanding the purchaser may have known of the existence of the judgment.

April 8, 1884.

Practice in Supreme Court. Records. *Bona Fides*. Statute of Limitations. Vendor and Purchaser. Before

Sluder vs. Bartlett.

Judge CLARKE. Jasper Superior Court. October Term, 1883.

On October 28, 1861, Bartlett recovered a judgment against Colbert Jeffries, J. T. Wyatt and John W. Wyatt. In 1873, Jeffries desired to go into bankruptcy, and employed Messrs. Key & Preston to conduct his case. Being unable to pay them in money, he offered to convey to them 100 acres of land; they were at first doubtful about taking the land, but after investigating and submitting the matter to the register in bankruptcy for his advice, and receiving his expression of approval and statement that the conveyance would be good, the deed was made. They testified that this was in the utmost good faith, and with no intention of defrauding anybody. Key & Preston, however, knew of the existence of the Bartlett judgment. This transaction was returned in Jeffries's schedule; it was made a ground of objection by a creditor, and the same was overruled. Plaintiff, Bartlett, knew of the conveyance in the fall of 1873. In that year the *fi. fa.* was levied on 600 acres of land, more or less, which plaintiff supposed was all of Jeffries's land. This levy was enjoined by the United States court, and was kept under injunction until 1878. One witness testified that he thought the levy covered all the land; thought it would cover this hundred acres under the terms "more or less." Other witnesses testified that the levy then made did not cover the land in dispute; and the court, construing the levy, so ruled. Key & Preston went into possession of the land now in controversy after their purchase in 1873, and remained in open, notorious, peaceable, continuous and adverse possession from then until December, 1878, when they sold to Sluder. Key & Preston testified that they believed they had a good title, and placed improvements upon the land. After the sale to Sluder, in December, 1878, this *fi. fa.* was levied upon the land, and Sluder interposed a claim. He knew of the debt to Bartlett, and was the as-

signee of Jeffries, but testified that he did not know of the judgment. Whether or not he knew of the judgment of plaintiff, there was some conflict. Under the charge of the court, the jury found the property subject. Claimant moved for a new trial, on the following grounds :

(1.) Because the verdict is contrary to law and evidence.

(2.) Because the court charged the jury that, "If the purchaser showed that, although he knew of the lien (meaning plaintiff's judgment), he made with the plaintiff satisfactory arrangements to secure the plaintiff's claim, that would vindicate the purchaser from the charge of fraud. But when it is shown that he bought with notice of the judgment lien, he cannot relieve himself of the appearance of legal fraud till he shows some conduct of the plaintiff, or his agent, which, in equity, would deprive the plaintiff of his right to enforce his lien, or something on his part towards the plaintiff in recognition and fair allowance of his rights."

(3.) Because the court charged as follows: "In the present case, gentlemen, the claimant admits that Key & Preston bought from the defendant in *fi. fa.* with full knowledge of the judgment of the plaintiff on this land. But he claims that they did not intend to commit a moral fraud or wrong on the plaintiff, when they bought; that they believed that they were getting a title which would prevail over the plaintiff's known lien; that they examined the law books and believed the law to make their purchase defeat the lien; that they afterwards consulted the register in bankruptcy, and he advised them that their title would be good against such liens; that they had the defendant to state in his bankrupt schedule the fact of his sale of this land to them for their fees in said bankrupt case; that the assignee never took charge of this land; that they, the purchasers, acted openly and without concealment or deceit. But I charge you that, even if all of these propositions are true, they do not free the purchase by them from the defendant, with actual knowledge of

Sluder vs. Bartlett.

plaintiff's lien, from the charge of legal fraud. If, then, gentlemen, Key & Preston bought from defendant in *fi. fa.* with full knowledge of the lien of plaintiff, as claimant admits, and if they have shown no other proofs of their good faith but such as I have stated, you ought to find by your verdict that they, Key & Preston, were not *bona fide* purchasers, and were not protected by four years' possession before levy from the judgment lien proceeding in this case."—This charge was excepted to as being contrary to the law and the decisions of the Supreme Court, and not authorized by the evidence, and on the ground that there was further proof of acts of good faith than those upon which the court based his conclusions in this part of the charge, and not covered by any part of his charge to the jury.

(4.) Because the court erred in all that part of his charge in which he submitted, as the law as to the *bona fides* of the purchasers, that no person who purchased with actual notice of the lien of a judgment could be a *bona fide* purchaser, unless he could show either some conduct of plaintiff, or his agent, which, in equity, would deprive him of the right to enforce the lien, or by his own acts in the transaction he recognized fully the right of such lien creditor to collect out of such property his debt or claim, and that such acts were the only acts meant by the Supreme Court in the "late decision" referred to by the court in his charge, "being in good faith towards the plaintiff."

(5.) Because the court charged that "mere waiting on the *fi. fa.* by the plaintiff was not such conduct, on his part, as to deprive him of the right to proceed on his *fi. fa.* His waiting did not wrong the plaintiff."

The motion was overruled, and claimant excepted.

The facts as to the motion to dismiss are stated in the first division of the decision.

KEY & PRESTON; J. H. LUMPKIN, for plaintiff in error.

G. T. & C. L. BARTLETT, for defendant.

BLANDFORD, Justice.

1. The defendant in error moved to dismiss this writ of error, upon the ground that certain original papers and documents, offered in evidence by plaintiff in error on the trial, were incorporated in the brief of evidence filed on the motion for new trial, and that copies of the same were not so incorporated. Upon this brief of evidence was the following agreement:

"It is hereby agreed that the within brief of evidence is a true and correct brief of the evidence, and contains the original papers, which we hereby consent shall be used. October 27, 1883.

(Signed)

G. T. & C. L. BARTLETT,
Plaintiff's Attorneys."

"Approved as a brief of the evidence, and ordered filed, October 27, 1883.

J. T. CLARKE,
J. S. C. P. C., presiding."

However much we disapprove the practice of incorporating original papers and documents in a brief of evidence, and the practice cannot be too severely condemned, in this case we do not think that defendant in error is in a position to aver against it. He consented to the use of the original papers in the manner in which they were used. He stands in *pari delicto*, by having consented to the use made of the original papers by plaintiff in error, and cannot urge its illegality in this motion to dismiss the writ of error. However wrong the plaintiff in error may have been, this wrong was participated in by defendant in error. The parties are equal in whatever wrong was done.

But we know of no case where the writ of error was dismissed, under circumstances similar to the one at bar. See *Baldwin vs. Daniel*, 69 Ga., 782; 30 Ga., 674. The papers are identified by the approval of the presiding judge. The transcript of the record, certified and sent up to this court, is regular, and we doubt if we can go beyond this in discovering errors and irregularities. The case is tried here upon a transcript of the record; if that is full

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and apparently regular, then we are to presume that the court below did all things right and proper. So we think the motion to dismiss this writ of error should be overruled.

2. The main question in this case arises upon a construction of section 3583 of the Code, which is: "When any person has *bona fide*, and for a valuable consideration, purchased real or personal property, and has been in possession of such real property for four years, or of such personal property for two years, the same shall be discharged from the lien of any judgment against the person from whom he purchased."

Is a person who purchased said property, with knowledge of a judgment against the person from whom he purchased, a *bona fide* purchaser, within the meaning of the statute? We think so. The fact that a purchaser had knowledge of the judgment against his vendor, does not constitute the purchaser a wrong-doer; he is, notwithstanding this knowledge alone, a *bona fide* purchaser. Yet we think that this may be looked to, in connection with other facts, in determining whether the purchase be *bona fide* or not.

Whether a purchaser be a *bona fide* purchaser, depends upon other facts than a knowledge by such purchaser of the existence of a judgment against the person from whom he purchased. If it be shown that such purchase was made to hinder, delay and defraud the creditor, or the circumstances show that such purchase was not made in good faith, but for the purpose of taking an undue advantage of the creditor, then he would not be a *bona fide* purchaser. But where a valuable consideration was paid for the property, and the purchaser enters into possession of the same as his own property, and holds it for four years (the same being real property), then the same is discharged from the lien of any judgment against the person from whom he purchased, notwithstanding such purchaser may have known of the existence of such judgment. Whatever may have been the rulings heretofore by a majority

Baker & Hall vs. Gladden, sheriff.

of the members of this court, we are unanimously agreed upon the proposition herein laid down, it being better that the law should be rendered certain, although it may be a bad law, than that it should be doubtful and uncertain, though it be a good law.*

The ruling of the court below not being in accordance with the views here expressed, the same is reversed.

Judgment reversed.

BAKER & HALL vs. GLADDEN, sheriff.

1. The holder of an unenclosed mortgage cannot claim at law the balance of a fund arising from the sale of the property covered by the mortgage, after paying the judgment under which it was sold, and which was older than the mortgage, but he can make such a claim in equity, and this could be done on a money rule, with proper allegations, showing the insolvency of the debtor and that the mortgage creditor would be without remedy, unless such fund were awarded to him.
- (a.) Certain property having been sold under a judgment, which was the oldest lien thereon, after satisfying it, the balance of the money arising from the sale should have been paid to an unenclosed mortgage, in preference to junior judgments, under proper pleadings to claim it.
2. Where property was sold under a mortgage *fi. fa.*, which was the oldest lien thereon, after satisfying it, the balance of the proceeds of the sale were properly paid to the holder of a deed to the property, in preference to judgments against the grantor rendered subsequent to its date, to the extent of the debt which the deed was made to secure.
3. Where counsel agreed, in writing, that the brief of evidence filed with the motion for new trial was correct, the writ of error will not be dismissed by this court, because such brief of evidence did not contain copies of certain documents, but only statements of their substance.

April 8, 1884.

Mortgages. Liens. Debtor and Creditor. Judgments. Money Rule. Practice in Supreme Court. Before Judge FAIN. Bartow Superior Court. • July Term, 1883.

*See *Sanders vs. McAfee*, 42 Ga., 250 et seq.; *Phillips vs. Dobbins*, 56 Id., 617; *Broughton et al., ex'rs, vs. Foster, ex'r*, 69 Id., 712; *Danielly, adm'r, vs. Colbert, adm'r*, 71 Ga., 216

Baker & Hall vs. Gladden, sheriff.

To the report contained in the decision it is only necessary to add the following: When this case was called in the Supreme Court, a motion was made to dismiss the writ of error, on the ground that certain documents in the brief of evidence were not copied in full, but only the substance of them was set forth. At the end of the brief of evidence appears the following agreement of counsel:

"We agree that this brief of evidence is correct. August 6, 1883.

GRAHAM & GRAHAM,
Att'ys for Hudgins & Mahan."

The presiding judge approved the brief, and ordered it filed.

The motion to dismiss was overruled.

J. A. BAKER, for plaintiffs in error.

NEEL, CONNER & NEEL; JOHN W. AKIN; GRAHAM & GRAHAM, for defendant.

BLANDFORD, Justice.

A tract of land, known as the Cassville place, belonging to John D. Lawson, was sold under an execution in favor of W. T. Wofford, founded on a judgment at law, which judgment was the oldest lien on the property of Lawson. The next oldest lien was an unforeclosed mortgage in favor of Mahan. There were divers junior judgment liens in favor of Baker & Hall and others. Another tract of land, known as the Mill place, was sold under a mortgage *fi. fa* in favor of Stokely, Williams & Co. These two tracts brought more than enough, the first to pay Wofford's execution, and the latter to pay the mortgage of Stokely, Williams & Co. Upon a rule brought to distribute the money, Mahan claimed the surplus arising from the sale of the Cassville place, after the payment of the Wofford *fi. fa.*, upon his unforeclosed mortgage. He, coming in and making himself a party to this proceeding, and alleging that said Lawson was insolvent, and that his mortgage was the next lien

Baker & Hall vs. Garland, Sheriff.

in date to Wofford's judgment, and an older lien than any other claimant of this fund; that if he was not allowed payment out of this fund, he was wholly without remedy. The court awarded the remaining fund, arising from the Cassville place, to Mahan, upon his mortgage. And this ruling is the first error assigned. The fund arising from the Mill place being more than sufficient to pay the mortgage of Stokely, Williams & Co., the balance was claimed by R. H. Jones, as a purchaser from Lawson, under a deed of conveyance, which deed was older than the common law judgments claiming this fund. The court directed that so much of the fund as was sufficient to pay the debt from Lawson to Jones, which the deed was taken to secure, be paid to Jones. And this ruling is excepted to, and error is assigned thereon.

1. We are of the opinion that the judgment of the learned judge who tried this case was correct on both grounds excepted to. The questions involved are not free from difficulty. The right of Mahan to claim the fund upon his unforeclosed mortgage, presents the most serious question in this case. That he could not claim at law has been settled by this court. 55 Ga., 607; Code, §1967. But we think he can claim in equity, and that this proceeding, together with the allegations, made by Mahan, is a proceeding in equity. So the question is made by these proceedings, who has the superior equity to this fund? We think, under the facts, that Mahan has. *Sims vs. Kidd*, 55 Ga., 625; *Smith vs. Brown*, 60 Ga., 484; *Newsom vs. Carlton*, 59 Ga., 519; 52 Ga., 588. If this fund be distributed to execution creditors, whose liens are junior to the mortgage of Mahan, he will be left wholly without remedy. The execution creditors claim this fund by reason of the liens of their respective judgments on the property sold, and not otherwise. Now, the lien of Mahan's mortgage on the property sold is superior to these judgment liens, and under the facts of this case, his equity, to have his mortgage paid out of this fund, is superior to the claims of these junior judgment creditors.

Schmertz & Company vs. Johnson.

2. The other remaining question is, did Jones, as a purchaser of the Mill place under a deed anterior to the common law judgments, have a right to the fund arising from the Mill place, after the payment of Stokely, Williams & Company's mortgage, in preference to the creditors holding judgments at law? We think so, for the most obvious reason that the judgments never had a lien upon the land which was sold under the mortgage of Stokely, Williams & Co. When these judgments were obtained against Lawson, he had no title to the land which was sold, and from the sale of which the fund arose. It had been conveyed to Jones; so that their judgments were not liens on the land. The fund being a surplus, after discharging the mortgage of Stokely, Williams & Co., this surplus should have been paid over to Jones, as was done in this case.

Upon a careful consideration of the record in this case, we find no errors in the several rulings of the court below. Judgment affirmed.

SCHMERTZ & COMPANY vs. JOHNSON.

1. Where affidavits used in connection with one ground of a motion for new trial were identified by the signature of the presiding judge thereon, and ordered to be filed of record with the motion, and were duly certified as a part of the transcript of the record, this was sufficient, and the writ of error will not be dismissed on that ground.
 2. The verdict is supported by the evidence.
 3. Although a written statement or memorandum of the indebtedness of the defendant to the plaintiff went out with the jury among the papers in the case, yet where it appears, from the affidavits of several members of the jury, that they never saw the paper; that it was not read by the jury, and that no allusion was made to it, a new trial will not be required.
 4. The other grounds of the motion are not sufficient to require a new trial.
- (a.) It is incumbent on the plaintiff in error to show error plainly and distinctly.

April 25, 1884.

Schmertz & Company vs Johnson.

Practice in Supreme Court. Practice in Superior Court. Jury and Jurors. New Trial. Before Judge CLARK. City Court of Atlanta. September Term, 1883.

To the report contained in the decision, it is only necessary to add the following:

The affidavits used on the hearing of the motion for new trial were identified by the judge's initials, endorsed on each. At the close of them, he passed an order, referring to such verification by initials, and ordering the affidavits to be filed and made part of the motion, and sent up as such. They accordingly appear copied into the record as part of it. A motion was made to dismiss, because they should have been incorporated in the bill of exceptions, and not in the record.

On the subject of the paper, which went out with the jury by accident or mistake, four of the jurors made affidavits, to the effect that it was not considered or discussed by the jury, and that they (the affiants) did not know that it was in the jury-room. One of them stated that, on retiring, a vote was taken, which resulted in a unanimous agreement to find for the plaintiff the full amount of his claim; that the jury then examined the original account and amendment of plaintiff, and a set-off claimed by defendant, and that those were the only papers he saw looked at.

BLACK & ALBERT, for plaintiffs in error.

HOKE SMITH; W. T. MOYERS, for defendant.

BLANDFORD, Justice.

The defendant in error brought his action against the plaintiffs in error to recover a sum of money which he alleged was due him as salesman and drummer. The jury returned a verdict in his favor, and he had judgment. The defendants moved for a new trial, on various grounds,

which the court overruled, and this judgment is excepted to, and error is assigned thereon to this court.

1. The defendant moved to dismiss this writ of error, upon the ground that certain affidavits read on the motion for new trial in reference to one ground of the motion, which affidavits were identified by the signature of the presiding judge, and ordered to be filed of record with said motion, and which are duly certified as part of the transcript of the record in the case from the court below, were not in the bill of exceptions. This motion will be governed by the decision rendered to-day by Jackson, C. J., in the case of *Crockett vs. McLendon*.

2. One of the grounds of the motion for new trial is, that the verdict is contrary to law and evidence.

We are satisfied that there is enough evidence, as disclosed by this imperfect record, to have authorized the verdict; at least it is not so totally without evidence to sustain it as to authorize this court to interfere with the judgment of the court below in refusing the new trial.

3. Another ground of the motion for new trial is, that a certain paper, or memorandum in writing, containing a statement of the indebtedness of plaintiff in error to defendant in error, went into the papers which went out with the jury. How this happened is unknown. Several of the jurors made affidavits that they never saw this paper; that it was not read by the jury, and that no allusion was made to the same.

Under these facts, it is not probable that the case of plaintiff in error was hurt or prejudiced by reason of said paper having gone out with the jury, and when this is so, it will not form a good ground upon which a new trial will be granted.

4. There are many other grounds contained in the motion for new trial, which, we think, are insufficient to authorize the grant of a new trial. Owing to the confused state of the record, many of these grounds are not easy of comprehen-

Collins vs. Dixon, guardian.

sion. It is an oft-repeated rule of this court, that he who alleges error must show error, as every presumption will be indulged in favor of the judgment of the court below. Errors complained of must be plainly and distinctly specified and set forth. All doubts will be resolved in favor of the rulings complained of.

Let the judgment of the court below be affirmed.

COLLINS vs. DIXON, guardian.

1. Where ejectment was brought by a guardian, who relied on a deed made to him as such, there was no error in refusing to charge that he had no right to purchase the land unless an order had first been obtained from the superior court authorizing such purchase. The question of authority in the guardian to invest the funds of his wards was one between him and them, and in which the adverse party in ejectment had no concern.
 - (a.) In this case the wards, after becoming of age, caused themselves to be made parties to the action which had been instituted by their guardian, and thereby ratified the investment made by him.
2. A levy on real estate in these words, "I have this day levied the within *pl. fa.* upon seven hundred acres of land, more or less, as the property of defendant," was void for uncertainty, and a sale thereunder conveyed no title.
 - (a.) However correct a request may be as an abstract principle of law, if it is not applicable to the facts of the case, it should not be given.

April 8, 1884.

Guardian and Ward. Ejectment. Title. Levy and Sale. Before Judge CARSWELL. Tattnall Superior Court. October Term, 1883.

Reported in the decision.

GARRARD & MELDRIM, by MYNATT & HOWELL, for plaintiff in error.

T. H. POTTER; R. D. WALKER, JR., for defendant.

Collins vs. Dixon, guardian.

BLANDFORD, Justice.

This was an action of ejectment for the recovery of a certain tract of land in Tattnall county. The defendants in error, who were the plaintiffs in the court below, introduced and read in evidence to the jury a deed of conveyance from Berrien Collins to Matthew Dixon, guardian for Ellen, Jincey and Wealthy Dixon, minors, dated 28th June, 1873, and recorded April, 1882, to the premises in dispute, proved possession in Berrien Collins when the deed was made, and closed. The defendant introduced a *fi. fa.*, founded on a judgment rendered 22d March, 1870, in favor of one Meinhart vs. Berrien Collins, which *fi. fa.* contained an entry by the sheriff as follows: "I have this day levied the within *fi. fa.* upon 700 acres of land, more or less, as the property of defendant, December 4th, 1873," and a deed from the sheriff, under this levy, to A. H. Smith, dated January 6th, 1874, recorded April 8th, 1875, to 700 acres of land in the 351st district G. M., of said county, which recited the sale of the land under the judgment, *fi. fa.*, and levy aforesaid, by the sheriff to Smith. To the introduction of this testimony, the plaintiff objected, upon the ground that the levy was void for uncertainty, and could not convey title. The court overruled this objection, and the plaintiff excepted, and files his cross-bill of exceptions. and assigns this ruling as error. The defendant then introduced a deed from A. H. Smith to Bryant Collins to 300 acres of land, the same being the premises in dispute, dated 14th October, 1875, being part of the 700 acres so levied on and sold by the sheriff to A. H. Smith. The defendant closed. The jury found for the plaintiff the premises in dispute. The defendant made a motion for a new trial.

(1.) Because the court erred in refusing to charge, as requested by defendant, that Dixon had no right to purchase from Berrien Collins the land in question, unless

Collins vs. Dixon, guardian.

you find that an order had first been obtained from the superior court, authorizing such purchase.

(2.) Because the sale by the sheriff, under the *Meinhart fi. fa.*, conveyed a title superior to that conveyed by the deed from Berrien Collins to Dixon, guardian. No matter what was the age of the lien sought to be paid thereby, the older lien must pursue the fund.

The court overruled the motion for new trial, and error is assigned to this court upon exceptions to the ruling of the court.

1. The first request to charge, assigned as error in the motion for new trial, is without foundation. Whether Matthew Dixon, as guardian, had the authority to invest the funds of his wards in the land or not, is a matter of no concern to the plaintiff in error, but was entirely between himself and his wards. The wards, after all becoming of age, made themselves parties to the action which had been instituted by their guardian, and they thereby ratified the investment made by their guardian for them; but whether this were so or not, Bryant Collins, the plaintiff in error, could not in any manner interfere therewith, and the court did right to refuse this request, which would have been manifest error, if it had been given.

2. The second request is good law, but the plaintiff in error was not in a condition to avail himself of it. The levy by the sheriff, as evidenced by the return of the sheriff on the *Meinhart fi. fa.*, was void for uncertainty; and the sale by the sheriff, and his conveyance to Smith of the land in question, passed no title; consequently, the conveyance by Smith to Bryant Collins did not pass the title to this land into the plaintiff in error. See *Brown vs. Moughon*, decided at the last term of this court, in which this doctrine is fully treated, and all the cases collated and referred to.

However correct the charge is as requested, yet, if the same is not applicable under the facts of the case, it should not have been to the jury. It is true, the court had let in

Chalker, for use, vs. Thompson *et al.*

the *fi. fa.*, entry of the sheriff and deed to Smith in evidence to the jury, which was error, yet, having committed this error, he cured it, as far as he could, by refusing defendant's request to charge, and by charging, as we are to presume he did, what the law was; that is, that this levy and sale to Smith under the Meinhart *fi. fa.* conveyed no title to this land to Smith, and consequently Smith could not convey title to Bryant Collins. So the judgment refusing the new trial was right, and must be affirmed.

The cross-bill of exceptions is dismissed, and upon the whole record, let the judgment of the court below be affirmed.

CHALKER, for use, vs. THOMPSON *et al.*

1. Where an application for homestead and exemption showed that a plaintiff in *fi. fa.* was one of the creditors of the applicant, and stated the place of his residence, if the ordinary approved such application, the presumption is that he did his duty, and that he would not have approved it unless sufficient proof had been made before him that the creditors had been legally notified. The proceedings were not rendered inadmissible because they failed to show such notice.
2. Where certain *fi. fas.* were levied on property and the defendant in *fi. fa.* replevied the property and gave a forthcoming bond therefor, but before the day of sale he had it exempted to him as the head of a family, the levying officer could not make a sale thereof, and there was no breach of the forthcoming bond for which a recovery could be had, by reason of the failure to produce the property on the day of sale.

April 15, 1884.

Presumptions. Ordinary. Homestead. Levy and Sale. Forthcoming Bond. Before Judge POTTLE. Glascock Superior Court. August Term, 1883.

Reported in the decision.

JAMES WHITEHEAD, by brief, for plaintiff in error.

Chalker, for use. vs. Thompson *et al.*

THOS. E. WATSON, by J. T. JORDAN, for defendants.

BLANDFORD, Justice.

1. Barton had two justice's court *fi. fas.* levied on the property of Thompson, who replevied the property, and Rivers became his surety on the forthcoming bond; after this, and before the day of sale, Thompson had the property exempted to him as the head of a family. The property not being forthcoming on the day of sale, plaintiff in error brought his action on the forthcoming bond. On the trial of this case, defendant tendered in evidence the exemption papers allowed by the ordinary. This was objected to by plaintiff, upon the ground that the papers did not show he had been notified of the application for exemption, and that he resided in the county of Jefferson. The application showed plaintiff to be one of defendant's creditors, the place of his residence being stated therein. The court overruled the objection, and admitted the testimony, and this ruling is assigned as error. The evidence was properly admitted, the presumption being that the ordinary did his duty, and would not have approved the application unless sufficient proofs had been made before him that plaintiff had been legally notified of the application.

2. There was no breach of defendant's bond in this case. Where the property was set apart and exempted to him, the levying officer could not make sale thereof, and it was a work of supererogation to carry the property to the place of sale.

Judgment affirmed.

ROGERS vs. TILLMAN.

1. While the practice of carrying original court records from one county to another for use as evidence is disapproved, yet where an original record has been brought into court and admitted to be such, it is admissible in evidence. A certified copy would not be higher or better evidence than the original.

Rogers vs. Tillman.

2. In an action to recover damages for malicious prosecution, it must appear that the defendant prosecuted the plaintiff maliciously and without probable cause.
3. An exception to the entire charge is too general.

March 4, 1884.

Evidence. Damages. Malicious Prosecution. Practice in Supreme Court. Before Judge WILLIS. Muscogee Superior Court. May Term, 1883.

The following, in connection with the decision, sufficiently reports this case: Green B. Rogers sued William L. Tillman for malicious prosecution. The prosecution which formed the basis of this suit charged Rogers with the fraudulent sale of mortgaged property, and of this charge he was acquitted. On the trial of the present case, the original record of an affidavit of illegality, which had been filed by Rogers and tried in Harris superior court, was offered in evidence, together with the verdict and judgment thereon. Defendant objected to the verdict and judgment, on the ground that the paper was an original record of the superior court of Harris county, and that a certified copy was the proper evidence. A note, on the side of the bill of exceptions, states that "counsel for defense consented to the admission of the affidavit of illegality, and admitted that the judgment, order of the court and verdict offered were the original." The verdict and judgment were admitted. (The bill of exceptions is very confused on this subject. It states that the defendant offered the evidence, and objected and excepted to its admission. It probably means the plaintiff.)

The court charged as set out in the decision. The jury found for the defendant, and a judgment was entered accordingly. Plaintiff excepted.

SMITH & RUSSELL; A. A. DOZIER; C. J. THORNTON, for plaintiff in error.

PEABODY & BRANNON, for defendant.

BLANDFORD, Justice.

There are several exceptions taken by the plaintiff to the decisions and rulings of the court below in this case.

(1.) The defendant offered an affidavit of illegality and verdict and judgment thereon in Harris superior court between these same parties, which was objected to by plaintiff, upon the ground that the same had become a record in Harris superior court, but admitted, at the same time, that the papers offered were original. The court overruled this objection, and this is the first error assigned.

(2.) The court charged the jury, "that one man may prosecute another for what he believes to be a violation of the law, and not be liable for damages for so doing; to render him liable, he must do it maliciously and without probable cause; and unless he does this, both concurring, he would not be liable, and the plaintiff could not recover." These are the main errors complained of.

1. The first assignment of error involves a practice which we do not approve. The carrying original papers and records from one court to another should be condemned and checked by the judges of the superior court, yet, as in this case, where the original record was offered in evidence, it being admitted that the same was the original record, it was properly admitted in evidence; a certified copy of this record could not have been higher or better evidence than the original.

2. The next error complained of by the plaintiff was the charge of the court, that to entitle plaintiff to recover damages for malicious prosecution, it must appear that the defendant prosecuted plaintiff maliciously and without probable cause. This charge, it seems to us, is strictly in accordance with the Code, §2982, which declares, "A criminal prosecution, maliciously carried on, and without any probable cause, whereby damage ensues to the person prosecuted, gives him a cause of action."

3. This court has frequently held that it would not con-

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sider general exceptions to a charge of the court, but the exception, to be heard here, must specify distinctly the points of the charge excepted to. A careful examination of the whole charge complained of shows that it was legal and fair; that it covered the whole case, including every theory as applicable to plaintiff's case, as well as the case of defendant, and we are satisfied that no injustice has been done to either party thereby.

Judgment affirmed.

HIGHTOWER vs. THE STATE OF GEORGIA.

1. In section 4500 of the Code, which prohibits the employment of a servant of another under written contract, attested by one or more witnesses, the term employment is not synonymous with hiring, but means to use a servant for a special or general purpose, inconsistent with his duty to his employer, with a mutual benefit.
2. In order to protect a party hiring a servant from the interference of others during the term for which the servant is employed, the contract must be in writing and attested by one or more witnesses, but the statute does not require that it be signed by both parties. If it be signed by the servant only, and accepted by the master, it is binding and sufficient, especially if he receives services thereunder.

May 18, 1884.

Criminal Law. Master and Servant. Contracts. Hiring. Before Judge CLARK. City Court of Atlanta. September Term, 1883.

Reported in the decision.

JAS. A. GRAY, for plaintiff in error.

W. D. ELLIS, solicitor city court, for the state.

HALL, Justice.

The indictment contained two counts, one for employing the servant of another, during the term for which he

was employed, and who was under a written contract, attested by one witness, the defendant knowing that the servant was so employed, and that his term of service was not then expired, and the other for enticing, persuading and decoying the said servant, who was under contract as aforesaid, knowing that he was the servant of the prosecutor, and that his term of service had not expired. There was a conviction and a motion for a new trial upon various grounds, which was denied, and hence this writ of error.

It will be necessary to consider only two questions made by this motion :

First. Does the statute under which this indictment is framed (Code, §4500) require that the contract shall be signed both by master and servant, in order to subject to prosecution a party knowingly employing or enticing the servant during the term for which he engaged?

Second. What is the meaning of "employing," as used in this act? Does it embrace a case where the servant is specially permitted, during the term for which he was hired to another, to work for the benefit of a defendant, and to serve him in any capacity, either special or general, without any stipulation as to the length of service or compensation therefor? Is this such an employment as will violate the statute?

1. We will consider these propositions in their inverse order. It is contended that the term "employment," in its legal sense, means "hiring," and that, as by the Code, §2085, hiring is a contract by which one person grants to another the use of the labor and industry either of himself or his servant, during a certain time, for a stipulated compensation, that the court erred in charging the jury, if they believed from the evidence that the defendant specially permitted the prosecutor's servant to serve him in any capacity which was beneficial to him, during the term that the defendant knew the servant was employed in the manner prescribed by law by another, then they would be authorized to find him guilty; that "to

use a servant for a special or general purpose, inconsistent with his duty to his employer, with a mutual benefit, is a sufficient employment under this statute." This charge, it seems to us, accurately defines the term "employment," as used in the statute. The idea of "hiring" may be involved in "employment," but its application is not restricted to any particular mode of use, as hiring. Use is synonymous with employment, and both include many other things besides hiring. One may use a thing, that is may employ it in his service or business, without any contract for any stipulated time or price whatever. Webster's dictionary, *verbis* "employment" and "use."

We are not aware of any legal sense, distinct from its ordinary signification, in which the word in question is used. If the legislature had intended to attach to it the confined signification contended for, it would have been an easy matter to have expressed that intention, but they have not done so; and there is nothing in the context or purpose of the act which could justify such a conclusion. Indeed, just the opposite of this intention seems to have been in the legislative mind, in order to prevent an evasion of the great object they had in view, viz., to prohibit such interference with this species of contracts as would render the supply of necessary labor irregular and uncertain. Persons are prohibited, under penalties, from employing the servants of others during the terms of their engagement, or from enticing, persuading or decoying them, or attempting to do so, to leave their employers, "either by offering higher wages, or in any other way whatever." This language stands in no need of interpretation; it speaks for itself; its scope and meaning are palpable and unmistakable, and in attempting to confine it, we should run counter to the plainly expressed views of the legislature.

2. To protect a party hiring a servant from the interference of others, during the term for which the servant is employed, the statute requires the contract to be in writ-

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ing, and to be attested by one or more witnesses. It does not require, in express terms, the signatures of both parties, nor of either of them, to the contract, nor does it declare that if it is signed by the servant only, that, on that account, it shall be void. The servant is certainly bound by his signature, and the other party, by accepting and holding the paper containing it, is likewise bound; especially is this so where there has been a part performance, as was determined by this court in *Linton and others vs. Williams*, 25 Ga., 391. It is true that was a contract for the future delivery of goods, and the one under consideration was for the future performance of personal services. What there is in the nature of such an undertaking to distinguish it from the principle asserted in that case, we do not perceive, and we are equally at a loss to understand how a mere interloper and wrong-doer can be permitted to avail himself of a power which the parties to a contract do not possess. There was no error in refusing to repel the contract from evidence, nor in the charge based thereon, after it had been admitted. The circumstances attending the alleged employment of the servant were submitted to the jury under proper instructions of the court; from them they seem to have been satisfied of the defendant's guilt, and the judge who tried the case did not abuse his discretion in allowing the verdict to stand.

Judgment affirmed.

KLINK vs. BOLAND.

[Blandford, Justice, being disqualified, Judge Hammond, of the Atlanta circuit, was designated to preside in his stead.]

- 1 Requests to charge, which would entirely exclude from the consideration of the jury the theory of the case on which the adverse party relies, should not be given.
2. Although a request to charge may contain a correct abstract principle of law, yet if it be so general as not to be of practical value, or to aid the jury in arriving at the truth under the evidence, its refusal will not be error.

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3. A request to charge, which assumed that the mere voluntary delivery by a wife to her husband of a bond for titles, which had been executed and delivered to her, would carry with it a full grant of power to do with it as he pleased, was properly refused.
- (a.) Where a conveyance has been made by a married woman, which is void by reason of being made to secure a debt of her husband, she cannot render it valid as to the creditor after it has been made; nor would the fact that she authorized the creditor to convey the property to a third party estop her from asserting her legal and equitable rights against such creditor.
4. Where one sought to sell property to a husband and take property belonging to the wife as security for the debt, but finding that this could not be done so as to bind her, a bill of sale to the property was made directly to her, and a conveyance with bond to reconvey was given by her to him to secure the debt, if the husband concealed from his wife the true nature of the transaction, and caused her to believe that he was the purchaser and she only security, a mere want of knowledge on the part of the vendor that there had been such a concealment would not be sufficient to relieve him, but there must also be an absence of reasonable grounds of suspicion.
- (a.) The charge of the court to the effect that, if the wife signed the deed, believing that she was doing so only as security, and if she had been so informed and the bill of sale concealed from her, then she was not bound, must reasonably and fairly have been taken by the jury to mean that, if the concealment and information had been by the husband and creditor together, or by the husband and known to the creditor, then she would not be bound.
- (b.) The circumstances of this case, showing a collusion on the part of the husband and creditor to induce the wife to make the conveyance contrary to law, were so strong as to leave no reasonable doubt that the creditor knew all about the transaction, or ought to have known, or taken more pains to inquire; and the evidence required the verdict.

HAMMOND, J., *dubitante* as to 4, (a) and (b).

April 8, 1881.

Charge of Court. Husband and Wife. Principal and Surety. Debtor and Creditor. Before Judge WILLIS. Muscogee Superior Court. November Term, 1882.

Reported in the decision.

PEABODY & BRANNON; LITTLE & WILLIS, for plaintiff
in error.

Klink vs. Boland.

J. M. McNEILL; L. F. GARRARD; THORNTON & GRIMES,
for defendant.

HAMMOND, Judge.

Mrs. Grace Boland, who was a married woman, conveyed certain real estate to C. A. Klink. She alleges that it was done to secure the debt of her husband. The facts connected with the transaction, as alleged by her, are these: Her husband, having purchased from Klink a bar-room known as the "Sans Souci," for the price of \$1,200.00, was unable to pay for the same, and, Klink demanding security, he induced her to convey her lot to Klink for that purpose. Klink gave her a bond to reconvey upon the repayment of the \$1,200.00 with interest. Klink took possession of her house and lot at once, and used it and enjoyed the rents until September 23, 1875, when, without her knowledge, he conveyed it to one Ryan for \$1,200.00. Ryan, on the same day and without her knowledge, conveyed it to one Wynne for \$2,018.75, and Wynne has ever since been in possession. She brought an action of ejectment against Wynne for the house and lot, but failed to recover, because Wynne, on the trial, showed himself to be a *bona fide* purchaser. She prays that Klink be held as trustee in respect to that property and the proceeds and value thereof, and that he be decreed to account to her for the same. Discovery was waived.

The allegations in the defendant's answer, which are material to the questions made here, are substantially as follows: Complainant's husband did propose to buy the bar, and to get his wife to give a mortgage on her property to secure the purchase money. Defendant was advised that this could not be done, and refused to make the sale to him. Complainant herself then proposed to become the purchaser, and the sale was made to her for \$1,200.00, she making an absolute deed to him to her said house and lot to secure the payment of that amount; and as part of

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the same transaction, he gave his bond to her to reconvey on payment of that amount. After the purchase, complainant took possession of the bar, by her husband as agent, and managed and controlled it until April, 1875, and then sold it for \$1,000.00. On the 23d of September, 1875, she surrendered her bond to defendant, and directed him to convey the house and lot to Ryan, upon payment of the balance of the purchase money, which was done.

The documentary evidence introduced showed that the title to the property in dispute was in complainant, as her separate property, and that she conveyed it to Klink, the defendant, and that Klink gave her a bond to reconvey upon payment of \$1,200.00 with interest, and that Klink gave to her a bill of sale to the "Sans Souci" bar. There were several receipts given by Klink to Mrs. Boland for part payments made on account of the purchase of the bar, and there was a power of attorney from complainant to Klink, authorizing him to sell the bar fixtures in the "Sans Souci" belonging to her, and pay certain notes and pay the balance to her, and also a power of attorney from her to her husband, authorizing him to receipt for any money due her, and some receipts given by him as her agent for money, etc.

The facts, as shown by the witnesses to the main transaction, are about these: Complainant's husband wanted to buy, and the defendant, Klink, wanted to sell, the "Sans Souci" bar-room. They agreed upon a trade, by which complainant's husband was to pay \$1,200.00, for which time was to be given. The payment of this money was to be secured by a mortgage on complainant's house and lot, and legal advice was sought for the purpose of consummating the transaction. It was then ascertained that complainant could not legally mortgage or convey her separate property to secure her husband's debt, and an effort was made to substitute her for him, so that the desired security could be lawfully given, the husband undertaking to obtain her consent to the transaction. The pa

pers were drawn accordingly, and the parties all repaired to her house, where she was sick in bed, for the purpose of obtaining her signature to the deed and consummating the transaction. They were there but a short while, and there is some discrepancy between the witnesses as to precisely what occurred during that time. She and her husband both swore that she had not been apprised of the true nature of the transaction, and that it was not revealed to her at that time. The deed was read to her, and she signed it, and the bond for titles was then delivered to her by Klink, the defendant. Klink testified that the bill of sale was handed her at the time, and Brannon also testified to the same fact. She and her husband both denied this. After the sale, the husband took charge of the bar and ran it, and managed it entirely in his own name; and he testifies that this was well known to Klink, the defendant. Afterwards the husband took the bond that had been given to his wife, and delivered it to Ryan, requesting Klink, the defendant, to make a deed to Ryan, which was done, and his bond taken up. Complainant and her husband both testify that she didn't know about the transaction, and that he did it entirely of his own motion, and without apprising her of his intention.

The issues were submitted to the jury by the presiding judge in the form of questions, which they were required to answer, and which were as follows:

1st. "Did Andrew Boland buy the 'Sans Souci' bar, and did Mrs. Boland make this deed to her house and lot as security for the purchase?"

2d. "If Andrew Boland bought the 'Sans Souci' bar, and Mrs. Boland made a deed to her house and lot to secure his debt, then what was the value of the house and lot at the time the deed was made, with interest thereon from the time it was conveyed to this date?"

3d. "Did Mrs. Boland purchase the 'Sans Souci' bar, and make the deed to her house and lot to secure the payment of her debt for the same?"

4th. "If Mrs. Boland bought the 'Sans Souci' bar of Klink, and made him a deed to her house and lot to secure the payment of her debt to him, then did Klink sell her house and lot to Ryan without her consent or with her consent?"

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5th. "If Mrs. Boland bought the 'Sans Souci' bar of Klink, and deeded her house and lot to secure the payment of her debt for the same, then how much did she owe Klink for the purchase money for the same at the time he conveyed the property to Ryan?"

6th. "What was the value of the house and lot at the time Klink conveyed to Ryan?"

7th. "Did Klink account to Mrs. Boland for the value of her house and lot, after deducting the amount of her indebtedness to him (if she was indebted to him)? If not, what amount of the value of the property was unaccounted for, with interest on the same to this date?"

The judge instructed the jury that, if they answered the first three of these questions in favor of Mrs. Boland, the complainant, they need not answer the others at all.

The verdict of the jury was in her favor, the finding being that the purchase of the "Sans Souci" was made by Andrew Boland, her husband, and not by her. The verdict also fixed the value of the property and the interest, and a decree was entered against the defendant in accordance therewith.

A motion was made for a new trial by the defendant, which was overruled, and that is the judgment excepted to. There were eighteen grounds in the motion, but only seven of them were insisted on in this court. They are as follows:

(1.) Because the court having, at the request of said defendant, given in charge to the jury the following, to-wit: "If you believe that the bill of sale to the 'Sans Souci,' the deed from Mrs. Boland to Klink, and the bond for titles from Klink to Mrs. Boland were all made and delivered as parts of one transaction, then the effect of such instrument is to vest the title to the 'Sans Souci' in Mrs. Boland, to make the debt for the purchase money her debt, and the deed made to secure this debt is valid and binding on her;" the court then went on to charge the jury as follows: "But if you believe from the evidence that Mrs. Boland had been informed that she was conveying her property as security for her husband, and the bill of sale to her was concealed from her, and she signed the deed

conveying her property, believing that she was doing so as security only for her husband's debt, then she would not be bound."

(2.) Because the court refused to give in charge to the jury, as requested by the defendant, in writing, the following: "Whether a given state of facts constitutes a debt, and if so, who is the debtor, are both questions of law."

(3.) Because the court refused to give in charge to the jury, as requested by the defendant, in writing, the following: "If the title to the 'Sans Souci' bar-room was made to Mrs. Boland, and she gave the deed as security for the purchase money, then she, and not her husband, is the real debtor."

(4.) Because the court refused to give in charge to the jury, as requested by the defendant, in writing, the following: "If the title to the 'Sans Souci' bar-room was not made to A. J. Boland, and if he gave no note or other promise to pay the purchase money, then he was not the debtor of Klink for the purchase money."

(5.) Because the court refused to give in charge to the jury, as requested by the defendant, in writing, the following: "Even if Boland did not explain the transaction to his wife, so as to enable her to fully comprehend it, still Klink would not be affected by such conduct of the husband, unless he knew of it before the deed was made to him."

(6.) Because the court refused to give in charge to the jury, as requested by the defendant, in writing, the following: "Even if the jury believe that Mrs. Boland did not understand that she was the purchaser, but believed that her husband was the purchaser and she was only his security, yet if this fact was not known to Klink, and if he made the transaction, believing that she did understand that she was the purchaser, she is bound by the deed."

(7) Because the court refused to give in charge to the jury, as requested by defendant, in writing, the following: "If the jury believe that Mrs. Boland delivered to A. J.

Boland the bond for titles, and did so voluntarily, and Boland delivered it to Klink, and at the same time requested him to convey the property to Ryan upon payment of the amount due to Klink, and Klink did receive the bond and make the conveyance as requested, and only received the amount due him from Mrs. Boland, and that Ryan received this deed with a full knowledge of the facts, then Mrs. Boland cannot hold Klink liable for such conveyance by him."

We will take up these grounds and dispose of them, not in the order named, but in the order of their importance, beginning with the minor ones first.

1. The requests made in the third and fourth grounds were objectionable, because the effect of them, if given in charge, would have been to exclude from the jury entirely, the consideration of the question as to whether or not the whole transaction was an effort to evade the law, and to accomplish an illegal act by a subterfuge. This was the theory of the complainant's case, and the court did right in refusing to exclude it from the jury by giving these requests.

2. The request contained in the second ground was properly refused, because, while correct in itself as an abstract principle of law, it could not have aided the jury in arriving at the truth, under the evidence, being too general to be of practical value for that purpose. It is much better for the court to tell the jury the precise law applicable to the facts of the case, in plain terms, that are comprehensible to men of ordinary business qualifications, than to deal in abstract legal principles that can only be readily apprehended by men of technical skill and learning.

3. The request contained in the seventh ground was properly refused for two reasons. First: It would make Mrs. Boland responsible for the unauthorized act of her husband. It assumes that the mere voluntary delivery by her to him of a bond for titles that had been executed

and delivered to her would carry with it a full grant of power and authority to do with it as he pleased ; whereas, in point of fact and truth, no such presumption would naturally arise from such conduct on her part. The evidence, on the contrary, was that she gave him no authority whatever to do as he did, and did not know or suspect his intentions. The second ground of objection to the request is a radical one. Where a conveyance is made by a married woman, which is void by reason of being in violation of the special provisions of the law on that subject, it cannot be vitalized by any subsequent conduct on her part. She is as much disabled from rendering it valid after she makes it, as she is from making it in the first instance. Otherwise, the law might be evaded, and its wholesome provisions rendered utterly nugatory, simply by obtaining the wife's consent to the making of a second conveyance by her vendee. It follows from this that, even if Mrs. Boland knew of, and expressly authorized, the conveyance from Klink, the defendant, to Ryan, she would not thereby be estopped from asserting her legal and equitable rights against Klink. The policy of the law is far reaching, the object being to afford complete protection, which could not be done, if she were allowed afterwards to vitalize the illegal act.

4. The last alleged error is that complained of in the first, fifth and sixth grounds of the motion. These three grounds of complaint are substantially the same, and will be considered together. The court refused to charge that Klink would not be bound by the conduct of the husband, if he failed to explain the transaction to his wife, and she did not understand that she was the purchaser, if he made the transaction, believing that she did understand, and unless he knew of the concealment from the wife before the deed was made, and did charge that if the bill of sale was concealed from her, and if she had been informed that she was conveying her property as security for her husband, then she would not be bound. The majority of the court

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are of the opinion that, while this presentation of the law was not strictly accurate, still it was not sufficiently erroneous to necessitate the grant of a new trial. They hold that the requests in the fifth and sixth grounds were properly refused, because a mere want of knowledge on the part of Klink that there had been a concealment, by the husband from the wife, of the true nature of the transaction, would not be sufficient to relieve him, but there must also be an absence of reasonable grounds of suspicion; and they hold that the language of the court in the first ground, to the effect that if Mrs. Boland signed the deed, believing that she was doing so only as security, and if she had been so informed, and the bill of sale concealed from her, then she was not bound, must reasonably and fairly have been taken by the jury to mean that, if the concealment and information had been by the husband and Klink both, or by the husband, and known to Klink, then she would not be bound. They hold, moreover, that, however this may be, even if an error was committed by the court, the circumstances showing a collusion on the part of the husband and Klink to induce the wife to make the conveyance contrary to law were so strong as to leave no grounds of reasonable doubt that Klink knew all about it, or at least, that he ought to have known, or taken more pains to inquire, and that the evidence required the verdict, and, therefore, the verdict ought not to be set aside.

With great hesitation and diffidence, I feel bound to say that I cannot yield my entire assent to this view of the case. I have grave doubts as to whether the charge of the court, as delivered, and the refusals to charge as requested, did not deprive the defendant of an important right in the case, by cutting off the jury from all inquiry into the question as to whether or not Klink had any knowledge or notice of grounds of reasonable suspicion that the husband had practiced fraud or concealment on

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the wife. See *Hull vs. Sullivan*, 63 Ga., 126. With the bare suggestion of this doubt, however, I am content to concur in the decision of the majority of the court.

Judgment affirmed.

JORDAN vs. BROWN et al.

1. While generally an administrator may, in his discretion, relieve a debt, not barred in the lifetime of his intestate, from the operation of the statute of limitations, by a new promise to pay, yet, where he has filed a bill to marshal assets, and has brought the creditors with their claims before the court, he could not arbitrarily relieve certain claims of the bar of the statute, and plead it as to others. Either he will be compelled to abstain from all interference in the matter, or, if allowed to interfere, it will be upon the condition that he applies the same rule to all who have equally meritorious claims.
2. Usually the limitations applicable to a court of law also apply to a court of equity, but the latter court may also interpose an equitable bar in accordance with its established rules, whenever, from lapse of time or *laches* of the complainant, it would be inequitable to allow a party to enforce his legal rights, and may interpose to prevent the bar from attaching. when, under like circumstances, it would be inequitable to permit a defendant to shield himself by pleading it.
 - (a.) Corn having been furnished to an estate to sustain the live stock and persons working the land, and a note having been given by the administrator, signing as such, this was sufficient to indicate that the debt was that of the estate.
 - (b.) There was sufficient in this case to entitle the plaintiff in error to submit his claim to a jury.
3. Without the consent of the different claimants, a bill to marshal assets and distribute an estate could not be finally tried and the rights of the various claimants determined, until it should first be ascertained what fund there was for distribution.

March 4, 1884.

Administrators and Executors. Equity. Statute of Limitations. Debtor and Creditor. Before Judge BOWER. Dougherty Superior Court. October Term, 1883.

Reported in the decision.

Jordan vs. Brown et al.

W. E. SMITH, for plaintiff in error.

D. A. VASON; R. HOBBS; D. H. POPE; HAMILTON McWHORTER; G. J. WRIGHT, for defendants

HALL, Justice.

This proceeding, in some of its aspects quite novel and somewhat anomalous, presents for determination various questions. The primary object of the bill was to arrest the levy of an execution upon the estate of George O. Dawson, deceased, and to prevent the sacrifice of such estate by a sale under said levy, on account of its being involved in litigation, commenced in Dawson's life, and which, if it terminated unfavorable to him, might absorb the greater portion, if not the whole, of his estate. An injunction was prayed and ordered, not only against the levying creditor, but against all others who, so far as known, were made parties to the bill. The bill was filed in 1878, and the injunction ordered as prayed. It is charged that complainant will be unable to determine, until the litigation is disposed of, which involves the title to the larger portion of the estate in his hands to be administered, what title or interest, if any, the estate has in and to the property in litigation, and what defences he should make to the suits instituted, or which may be instituted by creditors, in order to protect himself as such administrator and do justice as to the creditors, etc. He prays that the creditors may appear before the court and present and establish their several claims, that the amounts due to each of them, together with their dignities and respective priorities, may be ascertained and decreed, and that each of them may be restrained from instituting or prosecuting suits at law against complainant; that, after the litigation involving the property in hand to be administered is terminated, the court may decree the sale of the interest thereby ascertained to belong to the estate, and order the application of the proceeds of the sale among the persons entitled

thereto. Notwithstanding the pendency of the suit involving the title to the estate, and the impossibility of decreeing the sale of the interest represented by complainant therein on that account, the court, at its October term 1883, by the consent of plaintiff and defendant, tried the case and made a final decree therein, distributing the funds when they should come to hand, according to an arrangement agreed upon by the administrators and all the creditors before the court, except the plaintiff in error, who was no party to the arrangement.

Dawson, the testator, died in 1865. Whether the executor named in his will ever qualified does not appear. We are entirely ignorant of the contents of the will, or when the same was proved, as it does not appear to have been before the court below, and there is no copy of it in the record. All we know of any representation of the estate is Seabrook's qualification as administrator with the will annexed, in June, 1866, and the complainant's qualification as administrator *de bonis non* with the will annexed. It is evident that every claim in this record, except Outy's and perhaps that of Jordan, the plaintiff in error, was barred by the statute when this bill was filed. The claims of each of these creditors were acknowledged and taken out of the statute, except as above stated, at or immediately before the hearing, by a written acknowledgment of the complainant and a promise to pay them, in which acknowledgment, however, the complainant took good care to stipulate that he should incur no personal responsibility thereby. No plea of the statute was set up to the claim of the plaintiff in error until it was presented on the hearing, when that, with other pleas, were filed, over his objection. He asked that complainant be compelled to file a similar plea to the claims of others, and upon his refusal to do so, he offered to do it himself; both requests were refused by the court, and upon demurrer, his claim was rejected, and the decree was entered, by arrangement of the others, disposing of the estate, when

it should come to hand, among them, after paying expenses of administration, counsel fees, etc.

1. It is certainly true that an administrator may, in his discretion, relieve a debt, not barred in the lifetime of his intestate, from the operation of the statute of limitations, by a new promise to pay; in such cases, however, he does so subject to responsibility to the distributees, who may show by proof that the claim against the estate was in reality unjust. Code, §2542. How far an executor or administrator with the will annexed may exercise such discretion, or whether he can exercise it at all, is another question, upon which it is not now necessary to pass.

But this does not meet the case at bar. Can he exercise this discretion, after coming into a court of equity upon a bill to marshal assets and pay out the same among the various creditors, especially when the estate is hopelessly insolvent? We are decidedly of opinion that he cannot. He asks the aid of the court for his own relief, and asking equity, he might do equity, and give effect to all equitable rights of the other parties respecting the subject-matter of the suit. Code, §3084. As to the contest brought about among the creditors, he is a stake-holder and trustee for all alike. Wherever legal difficulties arise in the distribution of assets in payment of debts, or where, from any circumstances, the ordinary process of law would interfere with the due administration, without fault on the part of the representative of the estate, a bill to marshal the assets will be maintained at his instance (Code, §3146); and in marshalling assets, the court must look to the equities of creditors (*Ib.*, §3147,) for that court always seeks to do complete justice, and having the parties rightfully before it, it should proceed to give full relief to all of them in reference to the subject-matter. *Ib.*, §3085. Equity delights in equality, and even in cases of mixed assets, partly legal and partly equitable, will so apply this rule as to produce general equality among those having claims upon the several kinds of assets. *Ib.*, §§3143, 3090. So we reach the conclusion, under the facts of this case, that the

complainant should either have been compelled to abstain from all interference in the matter, or, if allowed to interfere, it should have been upon the condition that he applied the same rule to all appearing to have equally meritorious claims. It will not do, after the court is in possession of the estate for distribution among creditors, to make their rights dependent upon the arbitrary or capricious exercise of the administrator's discretion; this would be to substitute his will for the law; he cannot thereby alter the status which the parties sustained to each other at the commencement of the suit, and after he had abandoned all control of the matter and submitted it to the direction of the court.

2. But we are of opinion that there was enough set up by the pleadings and proof, as to the claim of the plaintiff in error, to entitle him to carry it to a jury, in reference to the questions made as to his right to payment. Early in the year 1866, he furnished corn to this estate to sustain the live stock and persons working the land in question, and enable it to carry on its planting operations. It does not appear, at the time the supplies were furnished, that there was any legal representative of the estate, but it is shown that Seabrook was then in possession, and that he was afterwards qualified as administrator. Before he was qualified, he signed a note acknowledging indebtedness for the same; to his name he added the words, "administrator on the estate of Geo. O. Dawson." Suit was brought on the note against Seabrook, administrator, as aforesaid, and judgment rendered in accordance; but there was in it nothing authorizing it to be levied upon the property of Dawson in his hands to be administered. On this judgment execution issued, and upon that execution there was, in 1875, an entry of *nulla bona*. If these proceedings can be used as evidence to charge the estate of Dawson, it is admitted that this claim is not barred by the statute of limitations, but if this be the personal debt of Seabrook, and the plaintiff in error has elected to treat him, and not



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the estate, as his debtor, then it is insisted he is bound by that election, and the case is within the bar of the statute.

That Seabrook signed the note, with the addition to his signature of "administrator of Geo. O. Dawson," sufficiently indicates that it was the debt of the estate (*Rawlings vs. Robson*, 70 Ga., 595), and that the plaintiff in error so treated it. At all events, this was a fact from which, with other circumstances, a jury would have been authorized to draw that conclusion. In making this purchase from the plaintiff in error, Seabrook unquestionably acted as the agent of Dawson's estate, and in that capacity gave the note, and suit was commenced thereon, and judgment rendered against him in the same capacity, and in that way the debt was kept alive, until within less than three years of the filing of this bill. The judgment is not now dormant, and could not become so, by reason of the injunction obtained by complainant restraining its enforcement. In *Wylly vs. Collins*, 9 Ga. R., 224 (15 head-note) 242, this court held that the statute does not begin to run in favor of a trust estate until a return of *nulla bona* against the agent, or his insolvency be legally ascertained; that it is not available where the legal remedy against him has not been barred. This ruling, with many others following in the same line, was made prior to the passage of the statute making limitations of action applicable alike to suits at law and in equity, Code, §2924; that prior thereto these latter courts were not positively bound by such enactment, but acted in analogy thereto. But by the latter clause of this section, these courts may, in addition, interpose an equitable bar in accordance with their established rules, whenever, from the lapse of time or *laches* of the complainant, it would be inequitable to allow a party to enforce his legal right; *e converso*, why should they not interpose to prevent the bar from attaching, where, under like circumstances, it would be inequitable to permit a defendant to shield himself by pleading it? There is no difference in principle in these several instances. 1

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Pomeroy's Eq, §§418, 419, and notes with citations; 2 Story's Eq. Jur., §§1521, and notes 7, 2. We are satisfied that the facts and circumstances out of which this claim grew, together with the efforts to collect it, should be more closely scanned and carefully investigated than seems to have been done on this trial, and that there should be another hearing.

3. But for the consent of the plaintiff in error to this trial, at the time it was had, we should have no difficulty in holding it premature, inasmuch as it was brought on before it was ascertained whether there would be any fund to be distributed among the creditors. How far this consent will be binding hereafter, it is needless to inquire, but we leave him to determine for himself whether it can or ought to be withdrawn.

Judgment reversed.

COLQUITT, governor, vs. SIMPSON & LEDBETTER.

[This case was argued at the last term, and the decision reserved.]

1. Where purchasers of property from one who was the president of a bank knew of his position, the law charged them with notice that the bank was a state depository and was required to give bond and security; and this was sufficient to put them on inquiry whether their vendor was not himself one of the sureties which he had, as president, to procure; and they were not purchasers without notice of the state's lien.
2. It was the duty of the president of the bank to make the bond and furnish the sureties thereon, and having executed it as president, and signed it as surety individually, he could not be relieved from liability because the name of one of the sureties which he furnished, and which appeared on the bond after his own was signed, was forged, and not signed by such surety; and purchasers of property from him, who were charged with notice that he was a surety, were subrogated to his position, and could make no defence which he could not make.
- (a.) It was therefore error to grant a new trial to such purchasers on the ground of the forgery.
3. State depositories are not public officers, but are instruments or

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agencies to keep the public funds. They are *sui generis* and *sui juris*, and stand on their own law, embodied in the act of 1879.

(a.) This differs from the case of the treasurer in 66 Ga., 408.

(b.) The bond in this case was accepted, approved and kept in the executive office in substantial compliance with the law. It is not required that an entry of filing and recording should be made upon the bond. The recital by the governor, under the seal of the state, is sufficient evidence that the facts existed, unless overcome by proof to the contrary.

(c.) That the bond was executed a little before the appointment of the bank as a depository can make no difference. It was done in view of the appointment, and had to be executed and approved before it could enter upon the discharge of duty.

May 13, 1884.

State. Bonds. State Depositories. Liens. Notice. Vendor and Purchaser. Officers. Before Judge BRANHAM. Floyd Superior Court. March Adjourned Term, 1883.

An execution, issued by the governor against the Bank of Rome, as principal, and C. G. Samuel and certain other persons, as securities on its bond as a state depository, was levied on certain property as the property of Samuel, and Simpson & Ledbetter interposed a claim.

The act of 1879 (Code, §943 (a) to 943 (g)) provides for the appointment by the governor of "a solvent chartered bank of good standing and credit in each of the following cities of this state, . . . which shall be known and designated as state depositories," and regulates their duties and liabilities. Section 943 (d), on the subject of the bonds of depositories, is as follows :

"Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond with good and sufficient securities, to be approved by the governor, in a sum of fifty thousand dollars. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the general assembly or the laws of this state, and for a faithful account of all the public money or effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the executive office, and a copy thereof, certified by one of

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the governor's secretaries, under the seal of the executive department, shall be received in evidence in lieu of the original in any of the courts of this state. And said bonds, when given, shall have the same binding force and effect, as the bond now required by law to be given by state treasurers, and, in case of default, shall be enforced in like manner."

On November 18, 1879, the governor appointed the Bank of Rome a state depository by the following order :

"By authority of an act of the general assembly, approved October 16, 1879, entitled an act to establish state depositories in certain cities of this state, and to prescribe their duties and liabilities, it is ordered :

That the Bank of Rome, a solvent chartered bank of this state, in the city of Rome, Georgia, be and is hereby appointed state depository for the term of four years from this date, subject to removal by the governor upon the condition named in said act; and the said Bank of Rome having, by its proper officers, executed a bond with good and sufficient securities in terms of the law, conditioned for the faithful performance of such duties as shall be required of it by the general assembly or the laws of this state, and for a faithful account of all the public money or effects that may come into its hands during its continuance in office, which bond has been approved by the governor, it is ordered that said Bank of Rome enter at once upon the discharge of its duties as such depository; and it is further ordered that the several tax collectors in the following counties, to-wit: Floyd, Polk, Chattooga, Walker, Haralson, Gordon, Whitfield, Catoosa and Murray, be, and they are hereby instructed and required to pay into said depository, and into no other, all moneys collected by them for and on account of state taxes, but, under the provisions of said act, money may be transmitted direct to the state treasurer by tax collectors."

The bank gave the following bond :

"Know all men by these presents, that we, the Bank of Rome, a body corporate, duly incorporated by act of legislature of the state of Georgia, approved by the governor, March, 2, 1874, as principal, and E. D. Frost, C. G. Samuel, W. L. Prentice, Mattie P. Deason, Samuel Morgan, as securities, do hereby acknowledge ourselves held and bound unto Alfred H. Colquitt, governor of said state of Georgia for the time being, and his successors in office, in the sum of fifty thousand dollars (\$50,000.00), lawful money of the United States of America, subject to the following conditions :

"The conditions of the above obligations are such that whereas the above bound Bank of Rome, a corporation duly incorporated and chartered under the laws of the state of Georgia, as aforesaid, was duly appointed for the period of four years from the eleventh day of

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November, eighteen hundred and seventy-nine, by his Excellency, Hon. Alfred H. Colquitt, governor as aforesaid, as a state depository of the funds of the state of Georgia, under the act of the legislature of said state of Georgia, passed October sixteenth (16), eighteen hundred and seventy-nine (1879): Now, if said Bank of Rome shall faithfully perform all such duties as shall be required of it by the general assembly, or the laws of this state, under the act of October the 16th, 1879, or any future act of said general assembly of Georgia on this subject of state depositories, and shall faithfully account for all the public moneys or effects that may come into their hands during the continuance of the said bank of Rome as such state depository, under the act before cited as passed or to be passed; and further, that said Bank of Rome shall well and truly do and perform all and singular the duties required of it by law as state depository, either by act of October 16, 1879, or any future act of the general assembly of the state of Georgia on the subject of state depositories, according to the trust reposed in it, then the above obligation to be void; otherwise, of full force and effect.

BANK OF ROME, [Seal.]
 by C. G. SAMUEL, Pres't.
 J. S. PANCHEN, [Seal.]
 Cashier, Bank of Rome.
 E. D. FROST, [L. s.]
 SAMUEL MORGAN, [L. s.]
 C. G. SAMUEL, [L. s.]
 W. L. PRENTICE, [L. s.]
 M. P. DEASON, [L. s.]”

Attest: PARK HARPER,
 J. B. HINE, Notary Public.

After the bond appears the following affidavit:

“Personally came before me, J. B. Hine, a notary public in and for the county and state aforesaid, E. D. Frost, C. G. Samuel, W. L. Prentice, Mattie P. Deason, Samuel Morgan, and upon oath state that they are worth the amounts set opposite their respective names, as herewith stated in this affidavit, over and above all debt and liabilities whatever, and over and above all right to claim of homestead or exemption under the laws of this state; E. D. Frost, fifty thousand dollars; Samuel Morgan, fifty thousand dollars; C. G. Samuel, thirty-five thousand dollars; W. L. Prentice, twenty thousand dollars; Mattie P. Deason, ten thousand dollars.

(Signed) E. D. FROST,
 C. G. SAMUEL,
 W. L. PRENTICE,
 M. P. DEASON,
 SAMUEL MORGAN.”

J. B. HINE, Notary Public. [Seal.]

The copy of the bond used in evidence was certified by the secretary of the executive department ; that it was "a true copy of the original bond on file in this office, and that said original has on it no entry of filing, approval or of record."

On April 1, 1881, the governor issued an execution against the Bank of Rome and E. D. Frost, Samuel Morgan, C. G. Samuel, W. L. Prentice and M. P. Deason, as sureties, for \$50,000 00. This execution recited the appointment of the bank as a depository ; that the defendants made and executed the bond in the sum of \$50,000.00, the principal through its president and cashier, and each of the sureties signing, sealing and delivering it as required by the act of the legislature ; that the bank had received \$53,015.76 which it failed to account for "after its acceptance of the office of a state depository, and after the execution of the bond aforesaid, and after the same was duly approved by the governor and filed and recorded in the executive office." It was levied on the land claimed.

Simpson & Ledbetter purchased the land levied on from Samuel, taking a bond for titles, on January 10, 1881, and giving two notes for the purchase money, due thirty days after date, for \$1,700.00 each. They testified that these notes were paid on February 12, 1881. Each of them testified that he did not know, at the time of the purchase or payment, that Samuel was on the bond of the bank. Ledbetter stated that he did not know that the bank was a state depository ; Simpson stated that he had heard of it, but did not know it of his own knowledge ; both of them knew that Samuel was president of the bank. Ledbetter stated that he had the records of the county examined, and found the title apparently regular.

The jury found the property subject. Claimants moved for a new trial, on the following grounds :

(1.) Because the verdict is contrary to law in this : The governor, under the law and the facts as proved, had no legal power or authority to issue the execution offered in

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evidence, because the bond was not made, executed, filed, approved and recorded, as required by law.

(2.) Because the verdict is contrary to evidence, and the weight of evidence.

(3.) Because the verdict is against the following charge of the court: "Now the claimants say that they took the property discharged from the lien of the state, because they were *bona fide* purchasers of the property for value, without notice of the state's lien. Now, if they were *bona fide* purchasers of the property for value without notice, then they would be protected, and the state's lien would be defeated."

(4.) Because the court charged as follows: "There are two kinds of notice, actual and constructive notice. If these parties had either, they would not take the property discharged from the lien of the state. It is for you to find whether they had notice or not of the fact that Samuel was one of the sureties for the Bank of Rome,—not that they had notice that the Bank of Rome was a state depository, and had given a bond, but whether they had notice that C. G. Samuel was one of the securities on that bond; and any circumstances or facts of which they were apprised, and which were sufficient to put a prudent man on inquiry, would be sufficient proof of notice."

(5.) Because the court charged as follows: "If you find that they had no actual notice, then you will inquire whether they had constructive notice. The law makes certain things notice, whether the parties knew the facts to exist or not, such as a deed, if it is recorded; the law calls that constructive notice. Now, if you find that the bond was made by the Bank of Rome, and executed on the 18th of November, 1879, and you will look to the records, which will be out before you, as well as the oral testimony, and if you find that the bond was filed, and placed on file or lodged in the executive office, and remained there at the time that Simpson & Ledbetter bought this property, and if it was lodged there before that date, the law pre-

sumes it was there then, unless the evidence shows affirmatively that it was not there, because that was the place where it belonged, then Simpson & Ledbetter would have constructive notice, and would not be purchasers for value without notice."

(6.) Because the court charged as follows: "In reference to constructive notice, I charge you that, if the bond was placed in the executive office at Atlanta before the purchase by Simpson & Ledbetter was made, and if that bond was placed there with Samuel's name as one of the securities, the presumption would be, that the bond remained there, unless there is some proof that the bond was taken away from the executive office. If it has been shown that the bond was there at the time of the purchase by Simpson & Ledbetter, the presumption is that it remained there, because that was the place where it belonged; or if the bond was there before the purchase, then it would amount to constructive notice, amounting in effect to the same thing as in the case of a deed that has been recorded in the clerk's office, whether they had actual notice of the fact or not."

(7.) Because the court admitted, over objection, the execution issued by the governor.

(8.) Because the court rejected evidence offered to show, by A. W. Ledbetter, that inquiry about liens and encumbrances was made of Samuel, and assurances made by him that there were none. [The court referred to the brief of evidence for a correct statement of what transpired in this connection. From this the following colloquy appears:

Question: "State where that purchase money came from, and what Samuel said when you paid for this property?"

Answer: "He represented to us that he"—(objections sustained.)

Q.: "Just state what you know of your own knowledge?"

A.: "I will state that Mr. Samuel came to me and said"—

(Mr. Anderson: "Don't state what he said.")

Witness: "He (Samuel) came to me, and sold me this property and I paid him for it, and he said that he wanted to pay off an overdraft in the bank." (This testimony rejected.)

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The court: "What Mr. Samuel said is not testimony. Samuel can testify what he knows himself. What was done, and what you know of your own knowledge, you can testify to, but you cannot repeat the sayings of Samuel."']

(9.) Because of newly discovered testimony to show that Mattie P. Deason did not sign the bond, or authorize any person to sign her name as a security; that it was not executed in the presence of an officer authorized by law or employed by the governor to witness or approve the same; that Mattie P. Deason and William L. Prentice did not justify or sign the affidavit attached to the bond. [On this ground, affidavits *pro* and *con* were introduced, which were directly conflicting.]

The Court granted a new trial, and the state, in the name of the governor, excepted.

C. ANDERSON, attorney general; JACKSON & KING, for plaintiff in error.

UNDERWOOD & ROWELL, for defendants

JACKSON, Chief Justice.

The bank of Rome was made a depository under the act of 1879, and gave a bond, with sureties thereon, to account for all money entrusted to it as such depository. The governor, under the act, issued execution against it and the sureties, which was levied on property claimed by defendants in error. The jury, on the trial of the claim, found the property subject. The court granted a new trial, and the state excepted.

1. These claimants hold title from Samuel, the president of the bank, not as president, but individually. The law informed them that the bank was a state depository. They knew that Samuel was its president, and that it had to give bond and security. That was enough to put them on inquiry whether he himself was not one of the sureties he had, as president, to procure. Therefore, they were not purchasers without notice of the state's lien.

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2. Nor do we think that the fact that M. P. Deason did not sign, but her name was forged to the bond, protects them. Their grantor or vendor was the chief officer, the president of the bank; it was his duty, not only to make the bond, but to furnish the sureties; he did execute it as president for the bank, and as surety individually, before Mrs. Deason's name appeared upon it as surety, and he could not ask to be relieved from liability because the name of one of the sureties which he furnished was upon the bond, forged by some one, and not signed by her.

Being charged with notice that he was surety, these claimants stand in his shoes, and can make no defence which he could not make. Therefore, we think that the court erred in granting a new trial to Simpson & Ledbetter, on the ground of the alleged forgery of the name of Mrs. Deason as Samuel's co-surety.

3. The only remaining question is this: Is the bond such an instrument as can be executed by summary process by the executive of the state? That depends upon the answer to the question, whether the act of 1879 has been substantially complied with, so as to make it a valid bond under that act which created these bank depositories, and prescribed the mode of the execution of the bond, and the remedies which the state might use in enforcing the bond against the parties to it, in case of breaches thereof.

We do not regard these depositories of the money received from the treasurer or collectors of taxes, in the districts fixed by law for collectors to pay immediately to them, as public officers of the state, in the sense of that term as used in the Code, from section 148 to 171, inclusive. A bank can hardly be called an officer. It cannot well be tried for misdemeanor and punished, under section 156 of the Code; and the entire chapter appears to us to be dealing with individuals, not banks. It is true, that the act of 1879, section 943 (d) of the Code, does use the term "during their continuance in office," and the act amenda-

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tory thereof, pamphlet laws of 1882-3, p. 136, in the second section thereof, uses the words, "the governor shall declare said office vacant;" but the word "office" is used in the sense of place, position, agency, and not, we think, in the sense that it is a public officer. In the very same section of the act of 1833, the words used are, "and the governor may declare the position vacant," thus using the two words as synonymous. The truth is that these banks are mere depositories of public money. They are somewhat like the Bank of the United States was, a depository of funds of the government for safe keeping; or, as certain state banks were for a time, under the administration of President Jackson, similar depositories. But no one would therefore rationally call either the old United States bank, or the state banks so used as depositories, public officers of the United States. They were agencies to keep the public money of the United States, and these are agencies of our treasury system, in like manner, to keep our public money; but the corporation in the one case was not a public officer of the United States, and in the other, these corporations are not public officers of this state. They are paid no salary under the act of 1879, but the governor is to make terms with them for the use of the state's money. They are to pay such interest as the governor, by "the most advantageous contracts he can" make, may be able to secure from them. Public officers, the treasurer for instance, are prohibited from making interest or other profitable private use of public money by the constitution. Code, §5124. "If the state treasurer, or any other officer of this state, shall use, directly or indirectly, the money of this state, such officer shall be deemed guilty of a felony, and on conviction shall be punished by imprisonment in the penitentiary, for any time not less than five, nor longer than twenty years," is the emphatic legislative act of the same session of the legislature of 1879, which organized these depositories. Code, §4425 (a). How inconsistent it would be that the same legislature

should pass an act to punish public officers for doing that which it was made the duty of the governor to contract with them for doing! It is clear, therefore, that they are not public officers, as understood by the general assembly which created the depositories. It follows that these depositories are instruments or agencies *sui generis* and *sui juris*, standing on their own law, embodied in the act of 1879, codified in sections 943 (a) to 943 (g) inclusive, of the Code of 1882, and the amendatory act of September 28, 1883, pamphlet, p. 136; Laws, p. 138.

It follows, too, that the principles ruled in the case of *Mayo, sheriff, vs. Renfroe and Wilson*, 66 Ga., 408, on the law relating to bonds of public officers, in that part of the Code from section 148 to 171, have no application to this bond. It stands or falls on the acts above cited, which alone controls it. Except that it refers to the treasurer's bond in respect to its "binding force and effect," and the provision that "it shall be enforced in like manner," it draws from no other law, and its validity and enforcement summarily will be found in sections 91 (a) and 97 (b) of the Code, taken from the act of 1876, pp. 127, 132. Section 91 (a) provides that "a lien is hereby created in favor of the state upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof;" and section 97 (b) provides that upon its breach, "it shall not be necessary to sue his official bond, but the governor is hereby authorized to issue a *fi. fa. instant* against the treasurer and his securities for the amount due the state by the treasurer, with the penalties and costs."

Therefore, what is said in that decision as to the time within which that bond of Renfroe was filed, or its execution within forty days from his election, or as to the time prescribed by law for its record in the office of the secretary of state, or in regard to the oath required of each surety

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in respect to what he was worth, and its being attached to the bond, and in regard to the construction of section 167 upon the point whether it gives a summary remedy, though the bond be not a valid statutory, but only a common law bond, has no application to the case at bar.

So far as that case is concerned, the court, as now constituted, think as the court which then unanimously decided, that the judgment could not have been otherwise than as rendered. The special legislation which fixed the amount due, and required the execution to issue for that sum, was enough of itself to sanction that judgment as absolutely demanded by the constitution itself.

The question here is, was this bond executed in such manner as to make it a valid bond under the act of 1879? For the amendatory act of 1883 was passed long after its execution, and does not affect its validity or enforcement.

That act of 1879 requires that it be in the sum of fifty thousand dollars. It is in that sum. It is to be approved by the governor. It is approved by him. It must "be conditioned for the faithful performance of all such duties as shall be required of the depository by the general assembly or the laws of the state, and for a faithful account of all the public money or effects that may come into their hands during their continuance in office." The condition of this bond is, that the bank "shall faithfully perform all such duties as shall be required of it by the general assembly or the laws of this state, under the act of October 16, 1879, or any further act of said general assembly of Georgia on this subject of state depositories, and shall faithfully account for all the public moneys or effects which may come into their hands during the continuance of said bank of Rome as such state depository, under the act before cited as passed or to be passed; and further, that said Bank of Rome shall well and truly do and perform all and singular the duties required of it by law as state depository, either by act of October 16, 1879, or any future act of the general assembly of the state of Georgia on the subject of

[Signature]

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state depositories, according to the trust reposed in it." It is thus seen that the condition of the bond is not only in the terms of the act, but it amplifies and enlarges them.

Lastly, the bond by the statute is "to be filed and recorded in the executive office, and a copy thereof certified by one of the governor's secretaries, under the seal of the executive department, shall be received in evidence in lieu of the original in any of the courts of this state." Within what time it is to be filed and recorded is not specified in the act. It is recited, in the executive order appointing the bank, that it was approved by the governor, and it is recited, in the execution issued by the governor and signed by him with the seal of the state, that it "was duly filed and recorded as required by law." And one of the secretaries certifies that the copy in evidence is "a true copy of the original bond of file in this office." It is true, that he also says in the certificate that there is no entry on it of filing, recording or approval. The statute does not require that entry to be made on it. It is enough that it be done; and that it was accepted and approved by the governor, and of file in the executive office, is beyond all dispute; and there is no evidence that it was not recorded; but the evidence goes only to the point that no entry of record was on it; and no such entry upon it was required. The recital by the governor, under the seal of the state, is sufficient evidence that the facts existed, unless overcome by proof to the contrary. Besides, it could be recorded nowhere but on the minutes of the executive department, and the filing therein made it as accessible to the public as such record would be. The object of recording is its preservation and the ease of making a copy when necessary. So that claimants were charged with constructive notice of the bond and sureties thereto.

We hold, therefore, that the bond was executed and accepted and approved and kept in the executive office in substantial compliance with the law. That it was executed a little before the appointment of the bank can make

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no difference. It was done in view of the appointment, and had to be executed and approved before it could enter upon the discharge of duty.

We are therefore of the opinion that the verdict of the jury in the case was right, and as the law of the case was given to the jury substantially in accordance with the views of the case hereinbefore expressed, and there is no error therein which could operate to make the verdict otherwise, we must reverse the judgment which granted the new trial.

Judgment reversed.

Cited for plaintiffs in error: 66 *Ga.*, 408; 1 *Id.*, 580; 3 *Id.*, 542; 6 *Id.*, 552; 9 *Id.*, 316; 5 *Id.*, 570; 44 *Id.*, 437; 60 *Id.*, 478; 62 *Id.*, 142, 187; 10 *Id.*, 417; 11 *Id.*, 286; Code, §§135, 154, 155, 156, 167, 169; 11 Wheat, 188; 1 Peters, 318; 3 Mason, 446; 33 *Ala.*, 692; 4 *Id.*, 403; 62 *Id.*, 404; 64 *Id.*, 122; 23 Tenn., 487; 1 Ware's R., 212; 49 Iowa, 576; 16 Wallace, 1; 2 Metcalf, (Ky.), 617; 53 Me., 284; 10 Cent. Law Jour., 176; Brandt on Suretyship, 358; 63 Mo., 216; reviewing and qualifying, 52 Mo., 75; 51 Me., 506; 3 O. St., 307; 6 Gray —; 3 Bush, 562.

For defendants: 17 *Ga.*, 522; 54 *Id.*, 83, 43; 47 *Id.*, 427; 43 *Id.*, 9; 52 *Id.*, 658, 569; 6 *Id.*, 202; 55 *Id.*, 287; 33 *Id.*, 332; 10 *Id.*, 414; 56 *Id.*, 439; 64 *Id.*, 740; 63 *Id.*, 486, 540; 10 Pet., 596; 7 Wheat, 46; 5 S. & P. (*Ala.*) 326; 2 Johns. Chan., 182, 604; 3 Wend., 208; 14 Am., 389; 25 *Id.*, 706; 29 *Id.*, 371; 33 *Id.*, 372; 28 Am. Dec., 680; 21 Am. R., 46; 11 Am. Dec., 111; 9 Am. R., 445; 5 *Id.*, 446; 21 Wall., 657; 51 Mo., 133; 62 Ill., 12; 44 Iowa, 537; 6 Exch., 89; 12 Wall., 47; 3 Bush, 361; 22 Ind., 399; 27 Ill., 173; 32 N. Y., 453; 4 Watts (*Pa.*), 53; 16 Wallace, 5; 53 Mo., 516; 3 *Ala.*, 88; 52 Mo., 75.

Colquitt, governor, vs. J. W. & W. L. Smith.

COLQUITT, governor, vs. J. W. & W. L. SMITH

[This case was argued at the last term, and the decision reserved.]

1. If the name of a surety on the bond of a state depository was forged, the state had no lien on the property of such person, and a purchaser of property from her obtained a good title. Whether the name of such surety was forged, and whether she ratified the signing of her name, are questions of fact for the jury; and the court below having granted a new trial because of newly discovered evidence to show that the signature was a forgery, this court will not interfere.
2. The affidavit of counsel sufficiently showed ignorance of the matter contained in the newly discovered testimony.

May 13, 1884.

State. Bonds. State Depositories. Forgery. New Trial. Before Judge BRANHAM. Floyd Superior Court. March Adjourned Term, 1883.

The main facts of this case are the same as those in the case of *Colquitt, governor, vs. Simpson & Ledbetter*, just preceding, and the bond, execution, etc., there set out are the same as involved in this case. It is only necessary to add that, in this case, the execution issued by the governor was levied on certain property as that of M. P. Deason, and J. W. & W. L. Smith interposed a claim, they having purchased the property from her and taken a deed dated March 8, 1881. The jury found the property subject. Claimants moved for a new trial, one ground being newly discovered evidence to show that Mattie P. Deason did not sign the bond or the affidavit attached thereto, and did not authorize any other person to do so for her, and that neither she nor Prentice justified or signed the affidavit attached to the bond. On this ground conflicting affidavits were introduced by the respective sides. The court granted a new trial, and the state, in the name of the governor, excepted.

One of the attorneys for the movants (Mr. Rowell) in his affidavit stated that "he did not know of the fact that

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William L. Prentice had not signed the affidavit as to his being worth twenty thousand dollars, attached to the bond given in matter of the Bank of Rome as state depository, neither was he certainly apprised of the further newly discovered evidence set forth in the motion for a new trial . . . until after the rendition of the verdict of the jury in the case stated, concerning Mrs. M. P. Deason's name not being signed by her to the bond of the Bank of Rome, . . . or authorized any one else to sign her name as surety for said bank.

C. ANDERSON, attorney general; JACKSON & KING, for plaintiff in error.

UNDERWOOD & ROWELL, or defendants.

JACKSON, Chief Justice.

1. This is the case of Colquitt, governor, vs. The Rome Bank and others, agents, and J. W. & W. L. Smith, claimants. It differs from the case of Simpson & Ledbetter, claimants, in that the claimants here bought from Mrs. Deason, whose name is alleged to have been forged to the deed. If she did not execute the bond, of course the state had no lien on her property, and any purchaser from her got good title. Whether her name was forged or her signature genuine, is a fact in dispute. There are affidavits on the newly discovered ground of the motion that she did not, especially her own, which authorized the circuit judge to grant a new trial on that issue. Whether she ratified it or not is also a question of fact for the jury. We cannot say that the judge erred in granting a new trial as to these claimants, so as to have these vital issues tried by the jury.

2. A point was made that Major Rowell's affidavit intimated that he might have known of this matter before trial, and that, as he is of counsel for the claimant, the new trial should not have been granted on this ground of

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newly discovered evidence. But we think the fact is that he knew nothing about it, and in the use of the word "certainly" in his affidavit, he meant to emphasize his ignorance, and not to intimate knowledge or suspicion about the forgery. It is inconceivable why, if he did know it, he did not use his knowledge on so vital a point in his client's case.

Judgment affirmed.

MATHIS, sheriff, vs. MORGAN.

[This case was argued at the last term, and the decision reserved.]

1. One who became a surety on the bond of a bank as a state depository cannot free himself from liability thereon, on the ground that the governor selected the bank as a solvent bank, and published it as one of the depositories, and that the surety was induced to become such by this fact, though the bank was not solvent at the time of its selection, and the giving of the bond by it. While it is the duty of the governor to use his discretion in selecting a chartered solvent bank, of good standing and credit, as a state depository, the very object of requiring a bond is to guarantee the solvency of the bank, and one who becomes a surety on such bond cannot discharge himself on the ground that the bank was insolvent.
2. Nor can such a surety relieve himself, on the ground that he signed the bond because of the selection by the governor, acting as the agent of the state, and on account of the law of the state which required the selection of a solvent bank, by reason of which the state represented the bank as solvent, and thereby made a false representation, on which the surety relied when he signed the bond. The state accepts the bond for its own security; it does not guarantee the solvency of the bank to the signers of the bond.
3. Where one who signed the bond of a bank as a state depository resided in the city where the bank was located, and had opportunity to investigate as to the condition of the bank before signing the bond, but did sign and enabled the bank to receive money belonging to the state, he could not relieve himself from responsibility on the ground of false representations made by the governor.
(a.) The facts in this case do not show false and fraudulent or corrupt conduct on the part of the governor.
4. The object of incorporation is to create an artificial being with

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perpetual life, or life for a term of years, and it does not cease to be such, although all of the natural persons who were first members of the organization die, sell their interest, or otherwise cease to be stockholders.

- (a.) If there was any impropriety in the transfer, the governor had no notice which was not equally accessible to the surety on the bond.
5. The sureties on the bond of a bank designated as a state depository are bound to see that the bank makes a faithful account of all the public money or effects received by it, whether from the tax collector or the treasurer.
6. Such a surety is not relieved from liability because his principal did not make returns to the governor strictly according to law, or because the governor did not remove or discontinue the principal as a depository.
- (a.) The fact that the bond was not recorded on the minutes of the executive office, but was referred to in executive orders there recorded, did not relieve the surety.
7. Where a surety to a bond given to the state as security for a bank depository signs it before another surety, whose name precedes his in the body of the bond, but is forged thereto in the signature, and where the name of the same person, as well as that of another whose name appears before that of the complaining surety in the body of the bond, appear as having signed an affidavit that they were worth a certain sum, but in fact they never signed the affidavit at all, but their names were forged to it; and where the complaining surety entrusts the bond to the president of the bank as an escrow, not to be delivered to the state until these sureties execute it, but the president does deliver it to the governor, the obligee, with all the signatures apparently genuine thereon, such complaining surety is not discharged from responding to the state upon the breach of the bond, even though one of the signatures so to be obtained was a forgery.
- (a.) Of one of two innocent persons, he who enabled the wrong-doer to do the wrong should suffer, rather than the other who put no trust in him and gave him no power to do wrong. Therefore, where the surety enabled the president of a bank to deliver to the state's agent a forged signature, when nothing appeared, in the face of the bond or otherwise, to put the governor on notice or inquiry, and the bank thereupon became a state depository and received the money of the state, the surety was estopped from asserting his freedom from liability on the ground that such signature was forged.
- (b.) The affidavit and forgeries thereon did not affect the case, as the law does not require the sureties to justify, and as the governor was ignorant of the facts; nor is it material in what order the sure-

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ties' names are stated in the body of the bond, the signature of the complaining surety appearing before the signature claimed to be forged.

May 13, 1881.

Principal and Surety. State. State Depositories. Bonds. Governor. Liens. Corporations. Estoppel Fraud. Before Judge BRANHAM. Floyd County. At Chambers. June 7, 1883.

The facts reported in the case of *Colquitt, governor, vs. Simpson & Leibetter* (the second case preceding this) sufficiently report the appointment of the state depository, the bond given by it and the execution issued thereon. This execution was levied on certain property of Samuel Morgan, one of the sureties on the bond, and he filed his bill to enjoin the sale, alleging, in brief, as follows: It was the duty of the governor to appoint a solvent chartered bank as the state depository, and the order alleged that this had been done, and it was so published, thereby making representations which complainant believed, and on which he relied; but in fact the bank was not a solvent chartered bank at that time, and the order of appointment was not passed until November 18, the bond having been given November 15. Complainant believed and relied on these statements in signing the bond. The Bank of Rome determined to retire from business, and on February 1, 1879, published a notice to the effect that on February 20 the business should come to an end. Subsequently, on February 20, A. Thew H. Brower, who was the president and owned and controlled all the stock, conveyed the certificates of stock, and sought to convey the franchises of the bank to Frost, Samuel & Company, and they conveyed back to him all of the property, real and personal, of the bank, the instrument of writing showing this transfer being signed by them only. The bill charges that, on February 20, the bank had no legal president or organization authorized to transfer its assets and franchises, and that the

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conveyance to Frost, Samuel & Company did not authorize them to reorganize and transact business in the name of the bank; that if they did acquire the franchises and corporate powers of the bank, they allowed Frost and Huston, two members of the firm, to subscribe for and take two hundred shares, or more than half the capital stock; that they were both non-residents, and had no property in Georgia, except what they acquired in this transaction; and complainant is informed that Huston has denied making the subscription; and that the governor had notice of the facts, when he appointed the bank a state depository. On November 13, 1879, five days before the date of the order appointing the bank as a depository, the so-called stockholders held a meeting and passed resolutions, reciting that the governor had appointed the bank a state depository on November 11, and authorizing Samuel, the president, to accept the position, and in behalf of the bank to give the bond required as a state depository, and to sign the name of the bank thereto, and authorizing the cashier to affix the seal of the bank thereto. Thereupon Samuel, as president, and Panchen, as cashier, executed the bond on which the present execution was issued, and complainant signed as a security. It is charged that the complainant relied upon the representations and statements made by the governor, as to the solvency of the bank, the legality of the appointment, etc. Also, that the governor did not approve the bond, as required by law, and that the securities were not bound. Further, the bond was given to secure the state on account of moneys paid into the bank by the tax collectors of the counties named in the order of appointment, and for none other; that this only amounted to \$29,517.70, while the balance of the amount claimed by the state (\$23,500.00) had been placed in the bank by the treasurer, and did not arise from taxes in those counties, and the securities on the bond were not liable therefor. The bank failed, and made an assignment to one Reynolds in March, 1881; the courts held the state to be a preferred

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creditor, and the state has received, partly by levy and sale and partly by direct payments, the sum of \$31,442.26, which, it is insisted, should be first applied to the payment of amounts deposited by the tax collectors in the depository. Further, the bank did not make regular returns, as provided by law, and the returns did not contain a statement of the funds and condition of the business, and it is charged that the governor should have removed the bank from its office as a state depository, and having failed to do so, it would be inequitable to hold the securities liable. The sheriff has levied on certain property of complainant, and is proceeding to sell it. The prayer was for an injunction.

An amendment was made, which is set forth in the seventh division of the decision.

On the hearing, the bond, execution, resolution of stockholders, etc., referred to above, were introduced in evidence, and certain affidavits *pro* and *con*, which need not be detailed here. Where the evidence is material to an understanding of the ruling made, it is stated in the decision. The court granted an injunction, and the defendant excepted.

C. ANDERSON, attorney general; JACKSON & KING, for plaintiff in error.

DABNEY & FOUCHE, for defendant.

JACKSON, Chief Justice.

This is another of the cases arising from the failure of the Bank of Rome as a depository of the money of the state. Morgan, one of the sureties on the bond of that bank as such depository, filed a bill against the sheriff of Floyd county to enjoin that officer from proceeding further in the enforcement of levies on the property of this surety, on various grounds set up in the bill and various affidavits therewith submitted to the chancellor in support of the allegations of the bill. The chancellor thereupon, and

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upon the defences thereto made by the state, granted the injunction, and the state, through the sheriff, represented by the attorney general, assigns for error here the grant of that injunction.

1. The fact that the governor selected this bank as a solvent bank, and published the same as one of the depositories, and the allegation that the surety was induced by this fact to become one of the sureties, is no reason, in law or equity, for the discharge of the surety from his obligation, even if, at the time of the selection of this bank, it was not solvent and the governor was mistaken as to its solvency. The discretion is vested, by the act of 1879, in the governor to select "a chartered solvent bank of good standing and credit" in the city of Rome as such depository; but in the apprehension that the governor might make a mistake in its solvency, the general assembly had the caution and prudence to provide in the same act that the bank should, before entering upon the discharge of its duties, before it got possession and control of the public money, give bond and security that it would respond to the state for failure to do its duty under the law, and especially for its failure to account to the state for such public money or effects of the state as it might become possessed of under the act.

It would be anything else than reasonable or equitable that the man who obligated himself to see to it that the bank was solvent and would be able to respond to the state for the loss of its money, should be allowed to set up the fact of its insolvency, when appointed or afterwards or before, as a reason for his relief. This bond guaranteed the solvency of the bank and its ability to respond. It pledged him that, if the bank proved insolvent, so as not to be able to respond, then he would himself make good the state's loss. To state the proposition that a surety that another is able and honest enough to handle public money can discharge himself by proof that the other, whose surety he was at the time he got the money, was not then

able to respond, is to show its fallacy, and with all deference to the able and distinguished counsel of the surety who drafted this bill, its absurdity. To indorse for one insolvent at the time, and then to ask to be relieved of the effect of the indorsement because he was insolvent at that time, are two propositions which make no harmony in the ear of justice; the notes are wholly discordant and make a medley utterly without melody.

2. Nor is the case of the surety bettered because he put his name to the bond of the bank because by its selection by the governor as the agent of the state, and by reason of the law of the state, which required the selection of a solvent bank, the state represented it to be solvent, and thereby made a false representation, on which the surety relied when he signed the bond. This would be to make the state guarantee to the sureties of the bank the solvency of every bank it selected as its agent. It would be to make the state the surety of the sureties of the bank, if insolvent when selected, because the state, in every instance, is required to select, through its governor, a solvent, chartered bank, and to publish and thus to represent it as solvent. And thus we would have the singular anomaly that the party demanding security before parting with money itself indorsed that, when he did part with the money to the principal, that principal was solvent. Thus, in every case where the principal was insolvent at the time it got the money, the state would be first on the list of sureties, first indorser, and responsible over to all the other sureties and indorsers of that principal.

3. To relieve the surety in this case from conclusions so irresistibly unsound, making so clear a *reductio ad absurdum*, the bill alleges facts which, it says, make the governor, the agent of the state, knowingly and falsely select this insolvent bank. That is to say, it states facts which, it charges, make the governor of the state act in this matter corruptly, fraudulently and in total disregard of the obligations of his oath of office, and in so acting, caused

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him to become the surety for this bank. Even if the facts alleged and proved made such a case, would the surety for this rotten and insolvent bank be relieved? Surely he should have known as much about the bank which he indorsed as the governor of the state did. He was a resident where the bank was located. He was about to become its indorser on a bond for fifty thousand dollars. His own interest required him to be on the alert. The magnitude of the bond demanded inquiry as to the bank's financial status. The principles of common sense, the foundation of all those principles, self-preservation, the first law of nature, as well as the well settled principles of law and equity in the books, put him on inquiry, and affected him with notice of the bank's condition. It was the state with which he was dealing. It was her money which he enabled this bank to get in its clutches. It was not the money of any agent of hers, of her chief magistrate, or any other of her officers; and when he was put on inquiry about the condition of the bank located at his door-sill, he was chargeable with notice of its condition, when he indorsed for it, and could not relieve himself by any false representation of her agent of which he had the notice that the inquiries of a prudent man in such a case required him to have.

But the facts do not show false and fraudulent or corrupt conduct on the part of the executive. Of what did he have notice? Only that about the first of that year, this bank had determined, in the hands of its then officers and stockholders, to close its business, and had notified its depositors and creditors to present their claims, and they would be paid; that the business had ceased to be profitable, and therefore, active business, as a competitor with others in banking, would cease. On or about the first of the year, this notification was made to the governor, and published in the Rome newspapers, with thanks to customers and depositors for the past, and the expression of a hope, if it should, or the then stockholders and president

should, resume business, its old customers would return to it or him with their patronage. In the last part of the year—the November following—the governor dealt with the application of the bank as a depository, and upon inquiry into its condition, from citizens of Rome, its solvency and credit, and among others, upon inquiry of one of the able counsel for those in this litigation with the state now about this bank depository, he adjudged and decided that it was a fit depository, on the strength of their indorsement of its solvency and credit. These were the basis of his false representations, if he made any. If this surety was injured by these representations, it would seem just that he should demand redress, not from the state, nor from her chief magistrate and agent, but from those who indorsed the standing and credit of this bank to the governor; but inasmuch as he himself indorsed the bank's solvency and credit too, not, indeed, perhaps with so much fervor and fluency as they did, by word of mouth and letter, but with the stronger emphasis of backing his judgment as her surety on a fifty thousand dollar bond, that the bank was solvent and of good standing and credit, his hope of redress from them would be slight, especially as he, too, lived in Rome, and had a greater interest than they had in investigating that standing and credit.

4. But it is again insisted that the bank had changed hands, and was no longer a chartered bank, because the then chief, if not only, stockholder and president had transferred all the stock and interest in it to Samuel, its president, when it was made the depository, and others. How that forfeited the charter, and made the bank, the entity, breathe its last breath, we do not so well understand. Banks constantly change hands. The stockholders, presidents, cashiers, all become new men from time to time, yet the entity lives, the same being in law which the state created. The very object of the incorporation is to breathe into organic being perpetual life, or life for a term of years, though all the original natural persons who were

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first so organized die or sell out, or otherwise cease to be stockholders therein. So the bank lived when it got this money, and as a living entity it was endorsed by this surety. If, in the contract which passed the stock out of the old into the new holders, there was any trade whereby the old assets were disposed of, and the new holders did not make deposits into the bank of enough cash to comply with their obligations, it is enough to say that the governor had no notice thereof, so far as this record shows, and, at all events, nothing accessible to him which was not to this surety. He had knowledge that the old officers were out, and signed as surety for the bank, when Samuel was its president, and the stock was all in his hands and that of the new stockholders.

5. But it is alleged further that the surety is responsible only for the money deposited in the bank by the tax collectors of those counties designated by the governor to pay the funds they collected into that depository, and not for other funds deposited there by the treasurer of the state. By section 943 (f) of the Code it is enacted that the tax collectors so designated need not pay into the bank depository, but may pay directly into the treasury, and that the treasurer shall not make a deposit with any other bank than those established by the act of 1879, from which the section was codified, most clearly allowing that officer to make other deposits in either of those banks. Moreover, the obligation of this surety is to see that the bank makes a faithful account of all the public money or effects received by it. Code, §943 (d). Anything received by it from the state, within the meaning of public money or effects, is included in this obligation; and surely public money received from the treasurer is so included. The bond follows the statute, and really enlarges the obligation thus imposed by the statute of 1879. So that there is nothing in this point.

6. Nor is more in the point that the returns made to the governor were not strictly according to law. To account

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for this money deposited with this bank, this surety indorsed that this bank would do so. How is he relieved because the annual returns were not regular and strictly in accordance with law? Suppose the governor ought, in rigid and close discharge of duty, to have removed the state funds or removed the bank as a depository, how does this dereliction of duty on his part relieve the surety? His emphatic obligation is to be accountable as long as it continues a depository, and not to be discharged when the governor ought to remove or discontinue it as a depository, or take the funds from it. All that, by the act which made part of the bond, was left by his contract with the state to the discretion and judgment of the chief magistrate, and his want of discretion or failure to exercise it wisely and with sound judgment, cannot excuse the surety from his bond. And so we think in regard to all the other points made in the bill of complainant, until we come to that on which the new trial was granted in the other cases, and on which it would seem that the chancellor rested the grant of this injunction.

In the case in which Simpson & Ledbetter were claimants, we have already considered the points made in respect to the invalidity of this bond as a valid statutory bond, and reference is made to the opinion in that case for the reason why it is held valid. The facts are the same here as there, except that in this record it appears that the bond was not actually recorded on the minutes of the executive department, but was referred to in the executive orders there recorded appointing this bank, etc.; but that opinion virtually concludes the point, even if not recorded.

7. Thus we are brought to the last point, that on which the injunction was granted, the effect of the forgery of Mrs. Deason's signature to the bond upon the rights of this surety. And really that is the only point upon which serious doubt can rest. Taking the sworn allegations in the bill and the amendment for true. is this surety dis-

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charged from his obligation to respond by reason of that alleged forgery? We have carefully examined the law thereon in the light of numerous authorities, and extracting from those authorities what we believe principle as well as the stronger current of authority fix as the law on the facts here alleged, we will apply that law to the facts, and thus see whether or not there is ground for equitable relief, and therefore for the grant of this writ of injunction.

The facts are most strongly presented in the amendment to the original bill. Substantially they are, that complainant signed the bond on the understanding and condition that Frost, Samuel, Prentice and M. P. Deason would sign it as co-sureties; that, as evidence of this fact, the names of these persons were written and inserted in the bond before complainant's name, when it was presented to him for execution by him, and that he would not have signed it but for that understanding; that at the same time that the bond was presented for his signature, there was presented and shown to him another paper, attached to the bond, purporting to be an affidavit signed before a notary public, in which these co-sureties were represented as worth, Frost \$50,000, Samuel \$35,000, Prentice \$25,000 and M. P. Deason \$10,000; that, upon the strength of these affidavits and the understanding that they would sign the bond, he then signed the affidavit and bond, and would not otherwise have done so; that Prentice was not worth the amount opposite his name, as thus falsely and fraudulently represented to him; that he learned from the affidavit and bond that both Prentice and Deason would sign the bond, and therefore signed it, and would not otherwise have done so; that, when he signed it, he left it with Samuel for the purpose of procuring the signature of Prentice and Deason; that, it was left with him on condition that it should be signed by the others before delivery to the obligee, and that thus Samuel held the bond as an escrow for the purpose aforesaid, and had no authority to deliver it to the obligee until executed by Prentice and Deason;

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that up to May, 1883, he believed they had signed the affidavit and the bond, but on that day he heard a rumor that it had not been so signed, and now has ascertained and charges that neither signed the affidavit, and M. P. Deason did not sign the bond nor authorize any one else to sign for her; that these signatures are not the acts and deeds of either Prentice or Deason, but made without their consent or authority; that J. W. & W. L. Smith have bought property from Deason, naming and describing it, and that Simpson & Ledbetter have bought from Samuel, describing it, neither having notice of the fact that either were sureties, and thus the former got good title from the forgery, and the latter as innocent purchasers without notice; that therefore he, the complainant, is relieved as surety on the bond.

These facts make this case: Where a surety or a bond given to the state as security for a bank depository signs it before another surety, whose name precedes his in the body of the bond, and is forged thereto in the signature, and where the name of the same person, as well as that of another, whose name appears before complainant's in the body of the bond, appears as having signed an affidavit that they were worth a certain sum, and never made the affidavit at all, but their names were forged to it, and the complainant surety entrusts the bond to the president of the bank as an escrow, not to be delivered to the state until these sureties execute the bond, but the president of the bank does deliver it to the governor, the obligee, with all the signatures apparently genuine thereon, is the complainant surety, in such a case, relieved and discharged from responding to the state, on the breach of the bond by the bank?

In 16 Wallace, 1, the case of *Dair vs. The United States*, it was held that a bond, perfect on its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties, upon

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the ground that they signed it on a condition that it should not be delivered, unless it was executed by other persons, who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced to act upon the faith of such bond to his own prejudice.

That case, in principle, covers this. The only difference in fact is that in that case the persons who agreed to become sureties did not sign the bond as such, and their names were not in the body of the instrument, so as to put the agent of the government on notice or inquiry that something was wrong; whereas, in the case before us, the name of her, who apparently signed, but, according to the allegation and proof by the complainant, did not really sign, was in the face of the bond. It appeared just as genuine in the signature as in the face of the bond, in the case at bar. There was nothing to put the governor on notice or inquiry, but on the paper, the face of the bond, and signatures and witness, everything looked genuine. Mrs. Deason's name was in the face of the bond, but it was also in the signature, to the bond. The point on which Mr. Justice Davis, in *Dair vs. United States*, placed the judgment in that case was, that there was nothing to put the government's agent on inquiry, and he distinguished that case from the case decided by Chief Justice Marshall, in *Pauling vs. United States*, 4 Cranch, 219; that in the latter case, the persons whose names were in the body of the bond did not sign, and the agent was put on inquiry to ascertain why they had not signed, and thus the government was not innocent. The decision rests on the principle, as old as Lord Holt, who said in 1 Salk., 289, "Seeing somebody must be a loser by this deceit, it is more reason that he that employs and put a trust and confidence in the deceiver should be a loser than a stranger," and which is now embodied in the familiar principle that, of two innocent persons, he who enabled a wrong-doer to do

the wrong should suffer, rather than the other, who put no trust in him, and gave him, by that confidence, no power to do the wrong.

In the case at bar, Morgan is innocent of this forgery, if there was one ; so is the governor equally innocent ; but Morgan gave the bond to Samuel to be executed by the other sureties, and thus put it in Samuel's power to palm off upon the governor a forged signature as genuine. Instead of carrying out what Morgan expected him to do, he delivered the bond to the governor, not genuinely executed, but forged by somebody, so far as Mrs. Deason was concerned. In *Dair vs. The United States*, the sureties were held to be estopped from setting up the fact that they signed on the express stipulation that others should sign, because there was nothing to put the agent of the government on inquiry, the names of the others not being in the face of the bond, and the agent acted, and the government acted to its injury, without being affected with notice directly or indirectly, the sureties having put it in the principal's power to do the wrong on which the government acted to its damage. So here the surety, Morgan, put it in the power of Samuel, the president of the bank and principal's agent, to palm off, as genuine, a forged signature upon the state's agent, the governor, when nothing appeared on the face of the bond, or otherwise, to give the governor the slightest notice, or put him on inquiry, that any signature was otherwise than perfectly genuine ; and this surety, too, must be estopped on the same principle.

As the court says in the case of *Dair vs. The United States*, there seems to be a "conflict of opinion in the courts of this county upon this point," but we conclude, as that court unanimously did, that the decision is "sustained by the weight of authority," and repeat what it said that, "at any rate, it is clear, on principle, that the doctrine of estoppel *in pais* should be applied to this defence." In that case the court cite 53 Maine, 284 ; 31 Ind., 76, and

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2 Metcalf, 608. To those cases we add 63 Mo, 212, where all the cases seem to be thoroughly considered and reviewed, especially 52 Mo., 75, cited by defendant in error here, which is greatly modified, if not, in effect, overruled. That court, in the 63 Mo., conclude that "the agreement of a surety with his principal that the latter shall not deliver a bond till the signature of another be procured as a co-surety, will not relieve the surety of his liability on the bond, although the co-surety is not obtained, where there is nothing on the face of the bond, or in the attending circumstances, to apprise the taker that such further signature was called for, in order to complete the instrument. In such case the surety, having invested his principal with apparent authority to deliver the bond, is estopped from denying his obligation to the innocent holder." See also 41 N. J., 403, and 64 Mo., 167. In the last named case, the principle was applied to a forged signature of one who was to be a co-surety, and covers fully the case at bar. See, too, 6 Gray, 90, and Brandt on Suretyships and Guaranty, 358, and cases there cited.

Indeed, since the adjudication in *Lewis et al. vs. The Board of Commissioners of Roads and Revenues*, 70 Ga., 486, the question is hardly an open one in this court. There we held that, "to permit these sureties, after the bond has been executed and returned, and the commission issued to their principal, who has acted under it, and received and failed to account for the public revenue, to set up as a defence to a proceeding founded on such default, that they stated to the ordinary, who took the bond, that they would not be liable till certain others signed it, would be to allow them to take advantage of their own wrong. They are estopped from so doing." That case is stronger than this, in that the ordinary was the officer or agent to take the bond; but as the governor approved it, and issued the commission, and it was not claimed that "the alleged conditional execution of the bond was ever made known to

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him," we held the sureties estopped. See also the authorities cited and considered in that case.

So we conclude that, however hard this case may bear upon Mr. Morgan, who was made a sufferer by the conduct of the man whom he trusted, and whose surety he really became, as the bank could procure none except through its officers, of whom Samuel was the chief, yet as the state, through its officer, was also perfectly innocent and Morgan put it in the power of Samuel to deceive the state to its great hurt, having acted and put its money in this bank on the strength of this bond, and lost it, we must hold him estopped from setting up this defence.

We do not see that the affidavit and forgeries thereon affect the case, as the law requires no justification on the part of any surety, and especially as the governor was equally ignorant of all that conduct; nor do we see how the order in which the sureties' names appear in the face of the bond affect it. The signature of Morgan precedes the forged signature. Upon the whole case, we conclude that the facts set up, viewing them as true, as set up and proved by complainant's own deposition, and those of others sworn on his behalf, make no ground in equity for his relief, and, therefore, that the injunction was improperly and illegally granted.

Judgment reversed.

For citations by plaintiff in error. see *The State vs. Simpson & Ledbetter, supra*.

Cited for defendants in error, in addition to what is cited there: 1 Kelly, 582; 18 Ga., 47; 33 Id., 332; 6 Id., 552, 302; 66 Id., 409; 29 Id., 399, 441; 36 Id., 669; 54 Id., 635; 17 Id., 47; 57 Id., 346; 6 Id., 202; 10 Id., 414; 11 Id., 286; 13 Id., 61; 17 Id., 111; Code, §§945, 2181; 943 (a); 2199, 3174-5; 3 Wash. C. C. R., 70; 1 Story Eq., 215, 283; 19 Am. R., 53; 25 Id., 703; 28 Am. Dec., 679; Cooley on Tax, 506; 21 Wall., 657; 10 Humph., 122; 14 Am. R., 389; 52 Mo., 75; Field on Corp., 286; 53 Mo., 516.

Hayne, administrator, vs. Dunlap et al.

HAYNE, administrator, vs. DUNLAP et al.

[This case was argued at the last term, and the decision reserved]

A will contained the following item: "I give, bequeath and devise unto my beloved wife, Mary Ann, and children, five lots of land (describing them), with all the rights, members and appurtenances to said lots of land in any wise appertaining, free from any charge or limitation whatever, when the youngest child becomes of age, the proceeds to be divided equally between my wife and children." By another item, authority was given to the executrix to sell one of the lots to pay debts, if she did not have funds enough to do otherwise:

Held, that the intention of the testator was that the *corpus* of the property should be held together until the youngest child became of age, and that it should then be sold, and the proceeds should be equally divided, without reference to any disposition that may have been made of the income of the estate prior to the sale, and without charging the share of each child with the amount expended from the income for it prior to the division.

February 19, 1884.

Wills. Estates. Legacies. Before Judge HAMMOND,
Fulton Superior Court. October Term, 1882.

Reported in the decision.

HOPKINS & GLENN, for plaintiffs in error.

Hoke SMITH, for defendants.

JACKSON, Chief Justice.

This is a bill for direction brought by the administrator *de bonis non cum testamento annexo* of the estate of W. J. Small against the legatees under the will, to determine how the third item shall be construed in the division of property bequeathed or devised thereunder. That item is as follows:

"I give, bequeath and devise to my beloved wife, Mary Ann, and children, five lots of land (describing them), with all the rights, members and appurtenances to said lots of land in any wise apper-

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taining, free from any charge and limitation whatever, when the youngest child becomes of age, the proceeds to be divided equally between my wife and children."

The contention is, whether the intention of the testator was to keep the *corpus* together until the youngest child became of age, with the right of the family, as a family, to subsist upon the income, without accounting individually therefor, or was an account of the expenditure of each child to be set off against the share of each to the *corpus* when sold and divided?

The court below held and decreed as follows:

"After reading and considering the foregoing bill and answer and hearing argument of counsel, it is considered, ordered, adjudged and decreed that the true construction of the will, about which direction is sought in said bill, is as follows: The words, "free from any charge or limitation whatever," were intended by the testator simply to mean that he did not create any charge or limitation on the estate given, and that he intended for the devisees to take an absolute fee-simple estate. The words "when the youngest child becomes of age the proceeds to be divided equally between my wife and children," mean that there was to be a sale of the land when the youngest child became of age, and that the proceeds of that sale were to be equally divided. The word "proceeds" does not refer to the income of the estate up to the time when the youngest child came of age, but refers alone to the proceeds of a sale of the property named, evidently contemplated by the testator."

Some objection having been made to the verbiage of this decree as written above, it was so changed as to decide, beyond dispute, that the proceeds of the sale of the land should be divided, "without reference to any disposition that may have been made of the income of the estate," prior to the sale of the lands, its *corpus*. *

By the fourth item, the executrix, who was the widow, was clothed with authority to sell No. 53, one of the lots, to pay debts, if she had not funds enough otherwise, which she did sell and apply. The other lots, thus left as the *corpus* of the estate, have been sold by the administrator *de bonis non*, the complainant in this bill, and he asks

*To this decree, as amended, the administrator excepted.

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how to divide the proceeds of this sale. The question, therefore, is, shall this fund be divided equally between the children, it being the proceeds of the sale of the *corpus*, and the income by rents having been used in the support of the family together, or is each share to bear the burden of the expenses of its owner up to the time of the division of the proceeds of the sale of the land?

The question of the intention of the testator, from the words of the will, is not free from difficulty, and we have been troubled how to come to a clear view and correct construction of the clause in question. It appears that the leading thought and main object of the will was the preservation of the *corpus*, it being substantially, that is these five lots being substantially, the whole property left to his family. The fourth item confers express authority to sell No. 53, one of the lots, if necessary, to pay the debts—that is, when the income from rents and other means were insufficient, but not before. This shows how averse he was to sell any of the *corpus*. The necessity to pay his debts must first be upon the executrix, and all other funds must be exhausted. No more was to be sold by virtue of his authority in the will, in any event, until the youngest child became of age. To preserve the *corpus*, then, was his main thought. For what purpose? It may reasonably be argued that, as no other purpose is apparent than to keep this property together until the youngest child became of age, his object was to support and educate the younger children out of the common fund, just as the older children had been supported and educated out of it while it was so held together during his lifetime. Thus the property which, in his own hands, had supported and educated the older to an age approaching majority, should be used by his wife, the executrix, to support and educate the little ones up to their majority, too. Thus that equality, which is equity in the heart of a parent, as it is generally in the law of the land, would be carried out by the will, and all his children would derive from the fruit of his toil equal

support during minority and dependence on the family for it. If the testator had intended otherwise, why did he not provide that each child, as she attained her majority or married, should have her share of the property? He has not so provided or intimated. Yet, if the will be construed to mean as contended for by the able and distinguished counsel for plaintiff in error, the effect will be to make that substantially testator's will, because, if the youngest child is to be charged with her support out of her own share, the result to her will be precisely the same as if the elder had hers divided off when she arrived at majority or married.

It is true that the words "free from any charge and limitation," the word "charge" especially, throw doubt on this construction. "Limitation" by itself would not, because its meaning is clear, as laid down by the court below in the decree; but "free from any charge," too, makes the item more puzzling. But do not the words mean without charge when the *corpus* comes to be sold and divided? The words are, "free from any charge and limitation whatever, when the youngest child becomes of age, the proceeds to be divided equally between my wife and children." There is no stop to indicate where another sentence began. Transpose the words, and the meaning is made clearer. The proceeds to be divided equally between my wife and children, free from any charge and limitation whatever, when my youngest child becomes of age. At that time, there is to be no charge for the past expenditures upon anybody. The *corpus* kept together as long as the youngest child is in her minority, is no longer to be kept together; but it is then to be sold, so that it may be divided equally, without charges on any one for the past, and the proceeds of the sale are to be divided then equally between the devisees. The words "free from charge" apply either to a charge upon the whole of the shares together or upon each share. In any event, under any construction, there must be a charge upon the income. Either the entire in-

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come or the income of each share must bear it. Construing the whole will together, which shall? We conclude that, considering the intent to preserve the *corpus* and keep it intact until the youngest child becomes of age and the obvious reason for such provision, the support and education of all the children, that the intention of the testator, if he intended "free from charge" to mean anything else than what the court below thought the clause meant, was to put that charge on the whole income of the property kept together, and not upon each share.

We conclude thus the more readily, because the property has been so managed as to make any other division uncertain, if not impracticable; separate accounts not having been kept of the expenses of each child, except in a few items scattered here and there through the returns; and because, to put the construction on the word "proceeds," as applying to income before the sale of the *corpus* would make the administrator liable to each devisee, as it seems to us, to an extent equal to, if not far beyond, that which the construction we give would charge him with, inasmuch as he could not, under the Code, without a previous order of the court of ordinary, encroach upon the *corpus* of either devisee. Code, §§2540, 1824.

Judgment affirmed.

Cited for plaintiff in error: Code, §§2302, 2459; 4 *Ga.*, 534; 22 *Id.*, 161; 31 *Id.*, 217; 53 *Id.*, 576.

For defendant: Code, §§1824, 2540; 2 *Bouv. L. Dic.*, 379; 2 *Abbott L. Dic.*, 326; *Rapalje's L. Dic.*, 1016; 35 *N. Y. S. C.*, 208

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1. There was evidence sufficient to authorize the verdict, and the judge did not abuse his discretion in refusing to disturb it.
2. The testimony of a witness, given on another occasion, like his sayings made elsewhere, may be resorted to for the purpose of impeaching him, provided a proper foundation is first laid for its admission. When the contradictory statements are made in affidavits, or in answer to written interrogatories, in the same case, there is no need of laying the foundation by calling the witness's attention to them; but this applies only to impeachment, and not to the correction of mistakes of a witness.
- (a.) If testimony was properly rejected, the ruling of the court will be sustained, although he may have given an insufficient, or even a wrong reason therefor.
3. The weight to be given to the evidence of witnesses alleged to have been impeached, is not one of the material questions in the case, without allusion to which the charge would be necessarily defective. It is only incidental or collateral to such material point, and, therefore, a failure to charge concerning it will not require a new trial, where the attention of the court has not been called to it, and no request to charge concerning it has been made.
4. A charge that admissions should be scanned with care by the jury, but that when clearly made out and proved, they were high and strong proof against the party making them, though somewhat inaptly expressed, was substantially correct, and will not require a new trial.
5. There was no error in admitting testimony as to what disposition the defendant's intestate said he had made of cotton while it was in his possession and under his control, such statements being made to a witness, who was endeavoring to obtain it from him in payment of a debt against him. This was admissible both as a disclaimer of title and to sustain witnesses sought to be impeached.

April 8, 1884

Verdict. Witness. Evidence. Charge of Court. Admissions. Before Judge CARSWELL. Johnson Superior Court. September Term, 1883.

I. L. Smith brought complaint for land against A. A. Page, administrator of W. C. Chester, and Mrs. W. O. Chester. He relied on a deed from W. C. Chester, the decedent. Defendants pleaded that this deed was given merely

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as a security for a debt, and a bond to reconvey on payment made; that the debt had been paid in the lifetime of the decedent; that if anything remained due at his death, it was only \$50.00, which had since been paid by Mrs. Chester. The equitable plea prayed that Smith be required to make a deed to the administrator of Chester, and offered to pay any amount which should be found still to be due on the debt.

The evidence was conflicting on the subject of payment, and need not be detailed here.

The jury found the following verdict:

“We, the jury, find the plaintiff \$85.05, principal and interest due on the land in dispute, to be paid November 1st, 1883. If not paid by that time, the plaintiff shall recover possession of said land. We find our verdict on plea of settlement made by plaintiff with defendant since death of W. C. Chester. So say we all.”

Plaintiff moved for a new trial, on the following among other grounds:

(1.) Because the verdict is contrary to law and evidence.

(2.) Because the court erred in this: After charging “that admissions should be scanned with care by the jury,” he added, “but admissions, when clearly proved and made out, are high and strong proof against the party making them.”

(3.) Because the court refused to allow counsel for plaintiff to introduce in evidence the following parts of the testimony of Mrs. W. C. Chester, embraced in a brief of the evidence agreed upon by counsel and approved by the court, as a true and correct brief of her evidence in a former trial of this case, to-wit: “In 1873, my husband delivered Smith a horse for \$120 on this land debt. This was shortly after the land trade was made;” and this, to-wit: “I don’t know whether the horse for \$120 was paid on the note first given for the land by my husband, with my father, Allen A. Page, as security, or on the note for \$500, given by my husband alone for the land, at the time when he gave Smith this deed to secure its payment;”—

this evidence being offered by counsel for plaintiff to show that the witness was mistaken when she swore, on this trial, that said horse was delivered in the spring of 1874, as a payment upon the last note of \$500, given by Chester to plaintiff for this land.

(4.) Because the court rejected from evidence, the following parts of the testimony of Allen A. Page, embraced in the brief of the testimony agreed upon and approved as his evidence, upon the first trial of this case, to-wit: 'In 1873, or first of 1874, directly after the note was given, Chester paid a black mare, valued at \$120, I thought \$125, as a credit on the note I and Chester gave;'—this evidence being offered to impeach said Allen A. Page, and to show that he was mistaken when he swore, on the present trial of said case, that said mare was delivered to Smith in the spring of 1874, as a payment upon the \$500 note, given by Chester to Smith for the land in dispute.

(5.) Because the court failed to charge the jury what weight they should give to the testimony of Allen A. Page, counsel for plaintiff having impeached said Page by two witnesses; and the court entirely omitted to give in charge to the jury the law upon the subject of impeaching testimony.

(6.) Because the court admitted in evidence the following answer of James R. Pritchard to the third direct interrogatory propounded to him, to-wit: "In the year 1875, Chester made an account with Mayo & Pritchard to the amount of \$120, and in the fall, he came up and paid us \$5.00, telling us he had to pay the balance of his money to Smith; that he owed Smith on land. In the year 1876, I saw Chester with three bales of cotton, and I offered him his account for one of them. He told me I could not get it; that it was Smith's (or words to that effect.) I don't know whether Smith got the cotton or not."—Objected to on the ground that these declarations of Chester were in his own favor, and that the evidence **did not** show that the cotton was delivered to Smith. [It

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was claimed by the defendants that Chester paid part of the plaintiff's claim in cotton, and other witnesses testified to the delivery of cotton by him to plaintiff in 1876.]

The motion was overruled, and plaintiff excepted.

JOHN M. STUBBS; HINES & ROGERS, for plaintiff in error.

A. F. DALEY; CAIN & POLHILL, for defendants.

HALL, Justice.

This was an action in the statutory form to recover the premises in dispute, to which the defendant pleaded the general issue, and further that the deed was executed and delivered by his intestate to secure a debt due from him to the plaintiff; that, upon the payment of the same, the plaintiff obligated himself to reconvey to said intestate; that the said intestate, in his lifetime, had performed his part of the contract by making full payment, but if there was any mistake in this, and any balance remained due, defendant was ready and willing and offered to pay the same, when ascertained; he prayed that an account might be taken of the dealings between the parties, and a judgment rendered awarding to plaintiff what might appear to be due him, and upon his receipt of the same, if anything was found due, that the title to the premises might be adjudged to be in the estate of the intestate. After much testimony of a very conflicting character, the jury found eighty-five dollars due the plaintiff on account of this transaction. Construed by the pleadings in the case, the legal intendment of this verdict was that the plaintiff should recover this amount, and that, upon the payment of the same, the title to the land should vest in the estate represented by defendant. The plaintiff was dissatisfied with this finding, and moved a new trial upon various grounds, which was overruled by the court.

1. We cannot say that the verdict was contrary to law and evidence, or that it was decidedly and strongly against

the weight of evidence. We think there was evidence to authorize it, and that the judge did not abuse his discretion in refusing to disturb it. It is his province alone to exercise this discretion. We are invested with no such power, except in clear cases of abuse. It is high time that the profession should understand this rule, and should act upon it. We cannot, and will not, usurp functions that belong to juries and to the judges of the lower courts.

2. There were several special grounds upon which it is insisted the new trial should have been ordered. The first we shall notice is that embraced in the sixth and seventh grounds of the motion for a new trial, and amounts to this, that the court committed error in refusing to admit in evidence the testimony of the defendant, and of Mrs. Chester, had on a former trial of this case, and embodied in a brief of evidence agreed to by counsel and approved by the court, which was offered, in the case of the last witness, to show that she was mistaken in her testimony given on the present trial; and in the first, to impeach and likewise to show that defendant was "mistaken" in his testimony given on the present hearing.

We are not aware that mistakes of witnesses can be corrected in this manner. The testimony of a witness given on another occasion, like his sayings made elsewhere, may be resorted to for the purpose of impeaching him, provided a proper foundation is first laid for its admission. This proposition will not be seriously questioned. In a case where the contradictory statements are made in affidavits, or in answers to written interrogatories in the same cause, there is no need of laying the foundation by calling the witness's attention to them. 7 *Ga.*, 467, 470, 471; 14 *Id.*, 186, (10 head-note). In the last case cited, this court said in express terms (p. 195): "We adhere to the rule that, in order to impeach a witness, by proof of contradictory statements, the foundation must first be laid by asking him whether or not he has made the declaration intended to be proved. But this does not apply where the

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evidence to impeach the witness is his sworn depositions, previously taken in the same cause." In the first of these cases, that from the 7 *Ga.*, 467, there is not only an exhaustive discussion of this requirement by the learned judge pronouncing the opinion, but the use of this testimony is restricted to the sole purpose of impeachment. From this record, it does not affirmatively appear that the attention of either of these witnesses was called to the language used by them on the former trial, or how much of this was repeated to them, or whether any part of it was read from the manuscript said to contain it. Nor was there an avowal at the time of the purpose for which it was sought to be introduced, which has always been held essential, in order that the court may judge of its materiality. *Id.* It may be true, as contended, that the judge gave an insufficient or even a wrong reason for rejecting the evidence. With this we have no concern; all that we can look to is the judgment rendered. If this is proper, it is immaterial by what process of reasoning it was reached.

3. The failure of the judge to charge as to the weight to be given to the evidence of witnesses alleged to have been impeached, when his attention has not been called to it, and no request has been made to charge in relation thereto, is not error. This is not one of the material questions in the case, without allusion to which his charge would be necessarily defective. It is only incidental or collateral to such material points, and does not fall within the cases cited from 17 *Ga.*, 444, and 67 *Id.*, 151; nor *Richardson vs. The State*, 70 *Ga.*, 825.

4. A charge that admissions should be scanned with care by the jury, but that, when clearly made out and proved, they were high and strong proof against the party making them, though somewhat inaptly expressed, is substantially correct. Code, §3792. When "deliberately made and precisely identified, they are usually received as satisfactory." 2 *Ga.*, 30. "Admissions by parties are not to be regarded as an inferior kind of evidence; on the contrary, when

satisfactorily proved, they constitute a ground of belief on which the mind reposes with strong confidence. But the proof of the fact that they were made, and of the terms in which they were made, ought to be cautiously scanned." 29 *Ga.*, 443, 450. In this last case, this court reviewed a charge to the effect that this "was an inferior kind of evidence," with the result above announced. Stephens, J., who delivered this opinion, speaking for himself, did not perceive "what reason there was for pronouncing a sentence of degradation upon this kind of evidence." In 64 *Ga.*, 537, 542, this court did not think it the duty of the judge to tell the jury that admissions, when clearly proved, became evidence of a high character; it was for them to weigh the testimony, and give it that character to which its weight entitled it. Nor did it think there was any impropriety in charging that admissions should be scanned with care, and there leaving it. Yet they did not go so far as to hold, that if the charge requested in that case had been given, it would have been error, for which the judgment should be reversed. The case in 60 *Ga.*, 185, does not cover the point in question. There the jury were restricted by the charge to certain inferences to be drawn from the admissions in evidence, which was properly held to be an unauthorized interference with their peculiar province.

5. There was no error in admitting testimony as to what disposition the defendant's intestate said he had made of certain cotton, while it was in his possession and under his control, to the witness, who was endeavoring to obtain it from him in payment of a debt which he held against him. This testimony was admissible, for what it was worth, as a disclaimer of title on his part to the property, and an acknowledgment of plaintiff's right to have it. Code, §3774. It was one link in the chain of the evidence, and if there was a failure to supply the others by showing that the plaintiff got the property, then it went for nought; but this was a matter for the jury, in connection with the

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other evidence in the case, which, to say the least, tended to that conclusion. Besides, it was admissible to corroborate the testimony of other witnesses, whose character had been assailed, and whose veracity the plaintiff endeavored to impeach.

Judgment affirmed.

SMITH et al. vs. BOHLER et al.

1. The board of education of Richmond county is one of the county authorities, and under the constitution of 1868, the legislature could grant to such board the power of taxation for school purposes.
2. Under the title, "to regulate public instruction in the county of Richmond," an act of the legislature could grant authority to the board of education to levy a tax for school purposes, and such an act was not unconstitutional, as containing matter different from its title.
3. Nor was an act regulating public instruction, which contained a power to the county board of education to assess a tax for educational purposes, unconstitutional, as containing more than one subject-matter.
4. An assessment by taking the returns of the county tax receiver and assessing upon property as therein returned the per cent laid by the board of education, was a legitimate and fair mode of procedure and in substantial compliance with the act of 1872.
5. Where an assessment was to be made in January, or as soon thereafter as practicable, the exact time of making the assessment was a matter of judgment for the board of education; and it does not appear how the delay until August caused any injury which would require an injunction.
6. The power to fix the amount of tax necessary being vested in the board of education, a court of equity will not interfere, unless it is made very plainly to appear that the tax is excessive. It does not so appear in this case.
7. Although the board may have consisted in part of persons who were not free-holders, they were all *de facto* in office, and competent to act until ejected.
8. The tax collector's bond binds him for these as for other county taxes. If it be too small, that may be reason for legislative change, but not for injunction.
9. That the chancellor, in rendering his decision, made use of language which did not please the ear of counsel for the plaintiffs in error, is no ground for a reversal.

May 13, 1884.

Smith et al. vs. Lohler et al.

Constitutional Law. Education. Richmond County. Tax. Bonds. Practice in Superior Court. Before Judge POTTLE. Richmond County. At Chambers. January 19, 1884.

This was a bill filed by certain citizens of Richmond county, alleging themselves to be tax payers, against the tax collector, sheriff, and board of education of Richmond county, to enjoin the collection of the school tax levied by the board for the year 1883.

Complainants made the following points :

(1.) That the act of 1872, organizing the board, is unconstitutional, because it contains two subject-matters, and contains matter not expressed in the title thereof.

(2.) Because the tax authorized to be levied is a personal or poll tax, and is obnoxious to article 7, section 2, paragraph 13, of the constitution of 1877.

(3.) Because the mode pointed out for levying the tax under the act of 1872, if constitutional, was not followed—complainants holding that the school commissioner should have himself taken the return and value of the property of each citizen, and upon such valuation assessed the school tax; the fact being that the school commissioner adopted the tax return made to the state and county tax receiver for state and county taxes, and upon this valuation assessed the tax levied by the board for educational purposes.

(4.) Because the tax levied is not to provide for the expenses of a thorough system of common schools for “instruction in the elementary branches of an English education only,” but is to be used for the purchase of school houses, sites, etc.

(5.) Because the tax levied is excessive.

(6.) Because the board was illegally organized, in that certain members were not free-holders and had been illegally elected, and without the vote of such members, the two-thirds vote required under the act to levy the school tax had not been had.

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(7.) Because the tax collector had no authority to issue execution for the school tax, and was without bond to collect the same.

(8.) Complainants contended in argument that the general assembly, under the constitution of 1868, had no authority to grant the power of taxation to said board.

The board alone demurred to parts of the bill, and answered, insisting on the constitutionality of the act of 1872, and upon the regularity and legality of its proceedings thereunder.

On the hearing, the bill, demurrer, answer and evidence were heard. From the evidence, the following may be abstracted as sufficient to elucidate the points decided: In 1882, the taxable property in the county, as shown on the digest, was \$17,989,050; in 1883 it was \$19,593,210. In 1882, the school tax was two mills on the dollar, and in 1883, two and 3-10 mills on the dollar, while the state and county tax was two and 5-10 mills each on the dollar. In 1882, the entire state and county tax was seventy-five cents on the \$100.00; in 1883, it was seventy-three cents on the \$100.00. \$40,000.00 was to be raised by this levy of school tax, and \$10,000.00 devoted to the purchase of sites, buildings, etc., through the local trustees and officials. It was also urged by complainants that, while the tax was nominally to produce \$40,000.00, yet a levy of two and 3-10 mills on the property in the county digest would produce \$45,064.38, besides other sources of income, so that the total income would be as follows: From local tax, \$45,064.38; from state fund, \$6,144.94; from former levies, from \$2,000.00 to \$3,000.00, say \$2,500.00; from high school fees, \$1,704.00; non-resident fees, \$128.00; poll tax, \$1,699.00; total, \$57,240.32; and if the sum of \$10,165.38, on hand January 1, 1883, is added, the total will be \$67,405.70.

At a quarterly meeting of the board of education, held on July 14, 1883, resolutions were offered that a school tax of two and 3-10 mills be levied, and that the county

commissioner make out an assessment and return, and furnish a copy to the county tax collector. These resolutions failed for want of a proper majority. The minutes call this session a secret session, but there was some evidence tending to show that a suggestion was made that the board go into secret session; that the chairman thereupon requested the reporters to retire, and that others remained. This meeting was adjourned until July 21, when the resolutions were again put and carried. No motion for reconsideration of the former action was made.

On about August 25, 1883, after the county receiver's digest had been filed with the collector for the collection of the state and county taxes, the school commissioner went to the tax collector's office and made the following entry on the blank page in front of the digest:

"State of Georgia, Richmond county.—I hereby certify that the within and following is a true copy of the assessment and return against all the legal tax payers of Richmond county, Georgia, of the tax for public school purposes for the year 1883, made by me in pursuance of law and resolution of the board of education—the total assessment being \$19,593,210, and the tax upon the same two and three-tenth mills on every dollar of property. Witness my hand and seal of said Richmond county board of education, this the twenty-fifth day of August, 1883. (Signed) L. B. Evans, Secretary of the Board of Education and County Commissioner."

At the same time, the commissioner handed to the tax collector a paper, of which the following is a copy:

"Augusta, Georgia, August 27, 1883—John A. Bohler, Tax Collector Richmond county, Georgia: I hereby certify at a meeting of the Richmond county board of education, legally held on the twenty-first (21st) day of July, 1883, it was voted, in accordance with the law, two-thirds of the members concurring therein, that the sum of forty thousand (\$40,000) dollars be raised in said county of Richmond for public school purposes for the year 1883, and that a tax sufficient to realize the same be levied, the said tax being two and three-tenth mills on every dollar of taxable property of the legal tax payers of the county. In obedience to the order of said board, and in pursuance of law, I do hereby assess and return a tax against all the legal tax payers in the county of two and three-tenth mills upon every dollar of taxable property held by legal tax payers in said county, in pursuance of the law entitled 'An act to regulate public instruction

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in the county of Richmond,' approved August 23, 1872. And I hereby place in your hands a copy of my assessment and return of said tax against all the legal tax payers in said county of Richmond, made out in pursuance of law. You are hereby directed to collect said tax and deposit it to the credit of the Richmond county board of education, in such bank in the city of Augusta as may be designated by the state commissioner for the deposit of the county school fund. In witness whereof I have hereunto set my official hand and affixed the seal of said board, this 27th day of August, 1883.

(Signed): Lawton B. Evans, Secretary Board of Education and County School Commissioner. [Seal.]”

A like certificate was placed at the end of the copy digest in the ordinary's office as in that of the tax collectors. There was no entry on the tax digest in reference to a levy of tax by the board of education, until the one above stated, and the tax receiver testified that, in making up the digest, he did so without reference to the assessment of a school tax. After this entry and notice by the school commissioner, the tax collector made a pencil memorandum opposite the name of each person of the sum which two and 3-10 mills would make upon the property owned by each, and when the tax was paid, with the state and county tax, the collector carried the amount, in ink, to the total or paid column.

Several members of the board of education returned no property for taxation, and seven members who voted for the tax imposed were elected by the board to fill vacancies caused by failure to hold an election at the expiration of the terms of former incumbents.

Defendants introduced evidence to the effect that the school system was the same as operated prior to the adoption of the constitution of 1877, and the increase in cost was due to increase in the number of children in attendance and the necessity of preparing for their accommodation. The tax collector and city judge testify that the margin of \$5,064.38 on a tax levy to produce \$40,000, was a just and proper allowance to cover insolvents, errors in digest, and collector's commissions. The tax collector further said: “That the entire amount the board can ex-

pect to receive from former tax levies will not exceed two thousand to three thousand dollars; that all unpaid taxes on said levies are in execution, and deponent believes a large part of the same are held back under affidavit of illegality." Each of the members of the board who voted to levy this tax had taken the oath of office before the ordinary, and received from him a commission signed by the governor.

Other points were made, to the effect that the funds were not to be used for elementary or common school education alone, but in schools in which a higher curriculum was adopted, the purchase of sites for schools other than high schools, etc., but these are not material to an understanding of the decision.

The chancellor filed a written decision, reviewing the case and refusing an injunction. Complainants excepted and made twenty-five assignments of error, the material points of which may be seen from the facts stated above. One assignment was as follows:

Because the court erred in inserting in his decision, as follows: "Prior to the late war we had no educational system, except one which degraded the children of the poor. A convulsion came. The fountains of the great deep of our civilization were broken up, millions of estates and securities were swept away, and at its close the children of the rich were leveled with the untold thousands of the poor. The children of the Confederate soldier were thrown upon us, and this vast array of a juvenile population became, at the boom of the last cannon, the wards of the state and the wards of humanity. Superadded to this, an immense population of the children of our former slaves were thrown upon us without culture and without the means of acquiring it. * * * If I am right, I shall have the satisfaction of knowing that no door will be shut to those who, invited by the state, stand and knock for something more valuable than earthly treasures."—The objection was that this was not relevant to any of the issues raised by the pleadings or facts in said case.

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FRANK H. MILLER; FOSTER & LAMAR, for plaintiffs in error.

J. S. & W. T. DAVIDSON; JOS. GANAHL; C. Z. McCORD; JAS. P. VERDERY, for defendants.

JACKSON, Chief Justice.

A number of tax-payers of Richmond county brought their bill in equity against the board of education of that county, the tax collector and sheriff thereof, to enjoin the levy of a tax authorized and assessed by the board of education, and on the refusal of the injunction prayed for, by the chancellor, they excepted, and assign for error here that refusal.

1. The board of education was incorporated and organized by an act passed by the general assembly of 1872, on the 23d of August of that year. See acts of 1872, p. 456. The title of the act is "An Act to regulate public instruction in the county of Richmond." By the 16th section thereof, this board was authorized to "levy such tax as they may deem necessary for public school purposes;" and the first point made by the plaintiffs in error is, that the general assembly had no authority to confer the taxing power upon this board. The general assembly of that year were acting under the constitution of 1868, then of force. By that constitution, Art. 1, Section 28, "the general assembly may grant the power of taxation to the county authorities or municipal corporations, to be exercised within their several territorial limits." Therefore, if the board of education be one of the county authorities of Richmond county, the legislature of 1872, acting under the constitution of 1868, did have the constitutional authority or power to grant to this board the power to tax for this purpose.

Was it a county authority? We think it one of the most important of all the authorities of that county. Education is the corner-stone of a political fabric, especially

where that fabric rests on the basis of popular suffrage. Neither roads, court houses nor district subdivisions, or other arrangements for good government, are more vital to society. To regulate the instruction of the children, who are soon to become the fathers and mothers of the land, is a great public trust, second to none, confided to the people's agents, and those clothed with power to perform such a work in a county constitute a great county authority, the very head of the list of the fiduciary agents of that county which confides such a trust to them.

The inferior court used to be clothed with the power to levy county taxes ; then the ordinaries possessed it ; then commissioners of roads and revenues exercised it. Some required the recommendation of grand juries, but all these were county authorities. May not county authorities consist of a different set of officers for different objects ? Why not ? The very fact that the plural—authorities—is used, shows that the general assembly were authorized to organize more than one man, or set of men if they chose, for the business of the county, and thus make a division of trusts and of labor. We think, therefore, that this board of education is as much a county authority in Richmond county as are the commissioners of roads and revenues, or the judge of the county court, or ordinary, or any other officer or set of agents entrusted with other branches of the public service in that county. The framers of the constitution of 1868 had at heart the great matter of general education, and entrusted the general assembly with ample power over the entire subject and the power, among others, to provide therefor by taxation. Art. VI.

2. Is the title, "To regulate public instruction in the county of Richmond," broad enough to embrace the power to tax ? The teachers must be provided ; children cannot be taught without them. To procure their services requires money. To raise the money necessitates the power to reach the pockets of the people. That power is nothing more nor less than the power to tax. So that, to regulate

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the great interest of public instruction involves and embraces the power to tax. The superintendent of the entire system is its practical regulator. He must be paid. Discipline, government in each school-room, must be confided to some subordinate to regulate the behavior of the children; and hence there must be a teacher in each school or school-room, otherwise it will be all play and no study, and nothing will be regulated for the sole object of the system, to-wit: "public instruction in the county of Richmond." To procure these head-regulators of each school, money must be had, and it is sheer nonsense to attempt the regulation without the money to pay the practical regulators. To furnish school-houses and rooms, money is equally essential, for these must be rented or leased, or bought or built; children cannot be taught, or regulated while taught, without places in which to house them. Whence is the money to be got for these necessary purposes of education, if not by taxation? We are clear, therefore, that the foundation on which the power to regulate public instruction rests, to-wit, teachers and school-houses, is money. It is the only means to the end. Without it the wheels all stop, and the factory, which makes men and women sufficiently strong in texture not to rot out and ruin the political fabric, sooner or later must suspend work in Richmond county; and the board of education will become wholly impotent to regulate public instruction, because there will be none for them to regulate.

3. It follows, from these considerations, that there are not two subject-matters in the act. If it be necessary to have money to regulate public instruction, then the mode of getting the money wherewith to regulate it is of the very essence of the power to regulate. It is more than germane to it. It is its life-blood, the most important part of its own physique; that which alone keeps it alive, without which neither foot nor hand nor head nor tongue could perform its function.

Therefore, the subject-matter of raising the money is

not a subject-matter, in the sense of the constitution, different from the subject-matter of the regulation of public instruction, and there are not two subject-matters in the act of 1872. *Hope et al. vs. Mayor and Council of Gainesville*, this term.

4. The mode of assessment was a substantial compliance with the 16th section of the act of 1872. It was based on the returns of the tax receiver of the county, and it assessed on property, as therein returned, the per cent laid by the board. It seems to have been a legitimate and fair mode of making out, with least expense to the tax-payers, an assessment and return of the tax which the action of the board, in fixing the per cent, authorized. It seems strange that equity should be invoked to enjoin the collection of the tax at the suit of tax-payers, when the mode adopted followed that used by the state, was based upon it, and thus saved the expense of paying for services equal to those of a tax receiver. The county commissioner could hardly pursue any other course and discharge the other duties devolving upon him, and this is another reason why we think the mode pursued by him, or some such mode, was that contemplated by the act of 1872.

5. The time of the assessment—August, 1883—is objected to, on the ground that it was not the month of January, “or as soon thereafter as practicable.” That is matter for the judgment of the board of education, and we do not see from the record how the delay hurt anybody so badly as to require the strong arm of an injunction to furnish a remedy for the wound. Perhaps the board waited to see what the taxable property of Richmond county would be in all, in order to lay such a per cent as would pay the expenses of education. If so, it was a capital good reason, and tax-payers should not complain, inasmuch as their interest was to have the per cent as little as possible.

6. So in regard to the charge that the tax is excessive; the power to fix the amount necessary is vested in the board. A court of equity would not interfere, unless it

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was made very plain that the tax was excessive. The facts disclosed in this record do not make such a case.

7. It is objected, too, that the board consisted, in part, of persons not free-holders, but they were all *de facto* in office, and competent to act until ejected. 63 *Ga.*, 207, 527; 20 *Id.*, 746; Code, §129, *et seq.*, 3764.

8. The tax collector's bond binds him for this, as for other county taxes. Its small amount surely will not authorize tax-payers to refuse to pay county taxes. Let them send members to the legislature who will have it increased.

9. Surely the exception that Judge Pottle, in his very able and learned opinion, used language which did not please the ear of counsel for the plaintiffs in error, was not seriously made one of the exceptions to his judgment, and urged as a reason to reverse it.

The questions relied on with propriety by the able and learned counsel for plaintiffs in error, are the constitutional points first considered. The others, we suppose, were hurriedly thrown in, many of them, as ballast or make-weight. On those constitutional questions, it may be well to add that, so far as general provisions of the constitution of 1877 may be argued to affect the system of education in Richmond county, that constitution itself provides a complete answer. The first paragraph of the fifth section of the eighth article of that constitution declares: "Existing local school systems shall not be affected by this constitution." Code, §5208.

Judgment affirmed.

See cited for plaintiffs in error: 4 *Ga.*, 38; 30 *Id.*, 679; 49 *Id.*, 238; 12 *Id.*, 36; 59 *Id.*, 364; 29 *Id.*, 158; 51 *Id.*, 573; 52 *Mo.*, 20; Cooley, 577-8; 12 *Barb.*, 559; 15 *Mich.*, 54; 9 *Wheat.*, 196; 8 *Heisk.*, 857; 1 *Lea*, 546; 2 *Met.*, 350; 51 *Ill.*, 130; 33 *N. H.*, 424; Potter's *Dwarris*, 420, 337; Cooley Tax, 52 n; 2 *Dillon Mun. Corp.*, 746; Burroughs, 74, 76; Suppl., 2-7; Field on Corp., 295; *The State vs. McLain*, 71 *Ga.*, 279; R. M. C. R., 26; 96 U.

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S., 104; 60 *Ga.*, 138; 64 *Id.*, 286, 498; 67 *Id.*, 293; 27 *Id.*, 354; Cooly on Tax, 210; 3 Greenleaf (Me.), 191; 18 Q., 161; 12 Barb., 559; Cooly's Con. Lim., 195, note 2; 27 Pa. St., 339; 19 *Id.*, 324; 16 Mich., 12; 20 Wal., 655; 3 *Id.*, 664; 40 Cal., 225; 4 Wheat., 30; 100 U. S., 545; 104 *Id.*, 613; 74 N. C., 707; 72 *Id.*, 10; 52 Mo., 336; 30 Ala., 461

For defendant: 9 *Ga.*, 253; 43 *Id.*, 554; 54 *Id.*, 664; 66 *Id.*, 226; *Wellborn vs. Estes*, 70 *Ga.*, 390; 7 *Ga.*, 460; 9 *Id.*, 142, 592, 252; 8 *Id.*, 316; 44 *Id.*, 78; *Howell vs. State*, 71 *Ga.*, 224; 58 *Id.*, 512; 33 *Id.*, 332; 52 *Id.*, 223; 63 *Id.*, 207; 20 *Id.*, 746; 44 *Id.*, 454; 41 *Id.*, 331; 63 *Id.*, 527; *Churchill vs. Walker*, 68 *Ga.*, 681; *McLain vs. State*, 71 *Ga.*, 279; 63 *Ga.*, 736; 49 *Id.*, 232; 57 *Id.*, 370; Code 129 *et seq.*, 69, 147, 3203, 934, 886; Code of 1873, §§5062, 5112; 1 Am. R., 399; 8 *Id.*, 602; 9 *Id.*, 578; 37 *Id.*, 456; 34 *Id.*, 151, 737; 46 *Id.*, 100, 456; 25 *Id.*, 235; 37 *Id.*, 454, 564; 30 *Id.*, 168, 246, 548; 29 *Id.*, 212, 267; 10 *Id.*, 35; 6 Am. D., 62; 19 *Id.*, 63; 32 *Id.*, 243; 21 *Id.*, 199, 213; 8 Wheat., 570; 104 U. S., 604; 4 Wheat., 316, 518; 9 Wall., 1; Acts of 1877, p. 347; of 1870, p. 57; of 1874, p. 109; of 1871-2, pp. 13 and 279; of 1873, p. 64; of 1878-9, p. 20; of 1874, pp. 30, 101; of 1880-1, pp. 36, 40; of 1872 462; 2 Dillon Mun. Corp., 745, 747.

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1. A trustee can make no profit for himself out of the trust estate. If he risk the trust funds and lose, he is compelled to account for their full value; if he is successful, he is required to pay what he gains to the beneficiary of the fund embarked in the enterprise. This rule applies not only to trustees *eo nomine*, but to all persons sustaining confidential relations to others, such as executors and administrators, guardians, agents, officers, partners, etc.; and there is no relaxation of this rule as against the sureties on an administrator's bond, where he has violated it.
2. An administrator or other trustee cannot appropriate to his own

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use any supposed excess in the price for which property entrusted to him may have been sold above its value.

(b.) Charges based on hypotheses not founded on the evidence should not be given.

2. A guardian is allowed all reasonable expenses and disbursements suitable to the circumstances of his ward, but the expenses of maintenance and education should not exceed the annual profits of the estate, except by the approval of the ordinary previously given.

(a.) It seems that where the trustee has acted fairly and properly without the consent of the ordinary previously given, and where prompt and regular annual returns of his actions in that behalf have been made, the ordinary, by his approval of such returns, may ratify the action. But where an administrator has held an estate in his hands, has failed to wind it up, has not made regular returns, nor has shown proper vouchers with those which he has made, and has sought to act as guardian without any appointment therefor, he cannot relieve himself from liability for the *corpus* by claiming to have absorbed not only the entire income, but also the *corpus* of the property in the support and education of the minor beneficiaries.

3. Regular returns received and approved by the ordinary are only *prima facie* evidence in favor of the administrator or his sureties.

(a.) Where returns were made out with a view of presenting them, but they were never received or approved by the ordinary, and some of them were not even verified, while they may be used as admissions against such administrator or his sureties, they are not evidence in favor of the defendants, unless their correctness is satisfactorily proved by other testimony.

(b.) The character and quality of the board furnished and the clothing, etc., supplied may be proved by one acquainted with the worth of them at the various times when furnished, but the amounts allowed as credits on this account must not exceed the annual income of the property during the minority of the beneficiary.

(c.) The value of services rendered by such beneficiary to the administrator or his wife should be deducted from the charges for supplies, and if all the income was not thus consumed, the excess should be accounted for.

4. In a suit by a beneficiary of the estate against the securities of the administrator, although he admitted, when on the stand as a witness, that he was willing to allow the defendants such an amount as he would have been willing to have allowed the administrator for support, maintenance and education, and was willing to allow what was reasonable and proper for what had been furnished, but thought the services rendered by him to the administrator and

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his family were worth his food and lodging, he did not thereby express a willingness to pay the demand as set up by the defendant.

5. When an admission is given in evidence, it is the right of the opposite party to have the whole of it, and everything connected therewith, shown. But where a plaintiff offered in evidence an incomplete return of an administrator as an admission, and it had folded in it various receipts, accounts, etc., referred to as vouchers, he was not compelled to put them in evidence along with the returns. That was the right of the defendants, if they could show that the enclosed were either a part of the admission or connected therewith.
6. There was no error in admitting testimony to sustain the credit of witnesses for either side, whose veracity had been assailed in any of the modes pointed out by the Code.
7. The other questions made by the record are not decided.

April 25, 1884.

Administrators and Executors. Guardian and Ward. Trusts. Charge of Court. Minors. Evidence. Admissions. Witness. Before Judge HARDEN. City Court of Savannah. November Term, 1883.

Reported in the decision.

DENMARK & ADAMS, for plaintiff in error.

CHISHOLM & ERWIN; R. R. RICHARDS, for defendants.

HALL, Justice.

Patrick Dowling died intestate, on the 14th day of December, 1866, leaving a widow, who survived him only a few days, and three minor children, the eldest of whom is the present plaintiff, who was, at the death of his parents, only about five years old. John Daley administered on the estate, and qualified by taking the oath and giving the bond required by law, on the first day of April, 1867. The bulk of the estate was in a drayage business with one Moran, who was the surviving partner of the intestate. This interest seems to have been sold to John W. Reilly for the sum of \$7,992, who gave his notes therefor, and

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they went into the hands of the administrator. From the scattering returns of the administrator and other written admissions of his in evidence, it is pretty clear that he realized every dollar of the principal of this note, together with the interest accruing thereon annually. No inventory or appraisement of the estate appears to have been made or returned. There are only two annual returns made out and sworn to, one in 1868, the other in 1870. Other statements in the handwriting of the administrator, some of them not sworn to, and none of them received or put on file in the court of ordinary, though a portion of them were found in the ordinary's office, but without the approval of that officer, were put in evidence by the plaintiff as admissions on the part of the administrator, to fix him with waste and mismanagement of the estate. This entire administration, from its inception to its disastrous close, conformed to the law in scarcely a single particular. The securities of this administrator, who was dead, against whom this suit was brought and prosecuted, defended upon two grounds, viz. :

(1.) That a higher value was placed on intestate's interest in the business of Moran & Dowling than it was worth; that Reilly's note was taken therefor; that there was no proof that it had been paid, except the testimony of Reilly himself, which it was claimed was contradicted in material particulars by records and other writings in the case, and was deemed unreliable on account of his past mental infirmity.

(2.) That the entire amount of plaintiff's interest in the estate of his father had been consumed in his maintenance and education, for which he expressed a willingness to account in a settlement with the administrator, while on the stand as a witness in this case, and a large portion of which had been allowed by the ordinary, when returned to that court by the administrator. These defences, under the instructions of the court and the facts admitted in evidence, prevailed. A motion to set aside the verdict in

their favor and to grant a new trial was made by the plaintiff, upon numerous grounds, which was overruled and denied, and to that decision exception was taken.

1. The court admitted the testimony of several witnesses, over the objection of plaintiff, to prove the actual value of the effects of the intestate in the firm of Moran & Dowling, for the purpose of showing that they were worth less than the price for which they were sold by the administrator. Error is assigned on this, as set forth in the 4th and 5th grounds of the motion for a new trial, as well as upon the charges based on it, as set forth in the 22d and 23d grounds of said motion, as follows:

(22.) Because the court erred in giving in charge to the jury the following request made by defendants: "The defendants are not required to account for the proceeds of any property in which the estate of Dowling had no interest, even if the proceeds of such property went into the hands of John Daley, and he charged himself with the same in his accounts as administrator of the estate of Dowling;"—there being no evidence to sustain such charge.

(23.) Because the court erred, after giving the said request, in charging the jury as follows: "That is to say, if Daley, as administrator of Dowling, received into his hands money or other thing which did not belong to the estate, and by mistake or accident charged himself with it as belonging to the estate, when it did not belong to the estate, he would not be liable for that himself, nor would his sureties be liable;"—there being no evidence that the said Daley had received, as said administrator, money or other thing which did not belong to the estate, or of any mistake or accident.

Upon what principle an administrator or other trustee is entitled to appropriate to his own use any supposed excess in the value for which property entrusted to him may have been sold, we are unable to comprehend. It is a fundamental rule that he can make no profit for himself out of the trust estate. This principle is so well estab-

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lished and so universally recognized—indeed so essential to the honest and proper management of property so situated, that he is never encouraged to take risks with it for his personal aggrandizement; on the contrary, he is restrained from so doing by being compelled, if his venture turns out unfortunately, to account for the full value of what is lost; and if it be successful, he is to turn over his gain to the beneficiary of the fund embarked in the enterprise. Code, §2332; 38 *Ga.*, 75 to 98; *Id.*, 452 to 458. This rule applies not only to trustees *eo nomine*, but to all persons sustaining confidential relations to others, such as executors and administrators, guardians, agents, officers, partners, attorneys, etc. *Mayor of Macon vs. Huff*, 60 *Ga.*, 221, 228, 229.

While it is not denied that the administrator is amenable to this law, it is insisted, nevertheless, that there should be a relaxation of it in favor of his sureties. But why? Is it not one of his duties to account faithfully for what comes into his hands, and do they not engage by their obligation that he shall perform this, among other duties, and if he fails to do so, is it not their undertaking to make good his default in this as in other respects? Such is the condition of their bond, without which he could never have become administrator and been invested with the power to take and manage the estate. Code, §2506.

The fine price which this property brought does not appear to have been due to the skill, fidelity and good management of the administrator, but to the advantageous and fortunate condition in which it was left by the intestate, growing out of his connection in business with Moran, and his willingness to continue in business with the party who purchased it.

We have searched this record in vain for any evidence that the return of this property by the administrator, at the price for which it sold, was the result of either “accident” or “mistake,” or that he “charged himself with property as belonging to the estate, when it did not belong

to the estate." On no principle of law was this evidence competent or the request and charge given to the jury justifiable? Neither can it rest on any sound legal basis, and were there nothing else objectionable in the case, this alone would compel us to set aside the verdict and order a new trial. But there are other errors quite as fatal, and, if possible, more so.

2. It is manifest from the record that this administration has been, in almost every respect, irregular and illegal. Neither inventory nor appraisement has been made and returned, and during the whole time it continued, only two returns of the administrator's actings and doings with the estate were made to the proper court; the first nearly a year and a half after his qualification, and the second two years thereafter. There was no reason why the estate should not have been speedily wound up and turned over to the distributees; that they were minors affords no excuse for the delay; if they had no guardians, the ordinary, upon proper application made, would have appointed them; it was the fault of the administrator that the matter was so long neglected. The estate seems to have been kept in his hands for an object; he appears to have held it that he might retain the custody of the persons of the minor children eventually entitled to it, and that he might absorb not only its entire income, but *corpus*, in their support and education; he usurped the office of guardian, and exercised all its powers and privileges, while he seems to have regarded none of the duties and responsibilities growing out of the relation.

The court in its rulings and charges seems to have recognized his right to do so, and to have extended to him higher privileges than those accorded to a regularly appointed guardian, in the settlement of his accounts with his ward. By the law, a guardian is allowed all reasonable expenses and disbursements suitable to the circumstances of the orphan committed to his care, but the expenses of maintenance and education should not exceed the annual

profits of the estate, except by the approval of the ordinary previously granted. The ordinary may, in his discretion, allow the *corpus* of the estate, in whole or in part, to be used for the maintenance and education of the ward. Code, §1824. This discretion to encroach upon the *corpus* is confided to the ordinary, and to him only; he represents the state, which, as *parens patriæ*, stands *in loco parentis* to minors, and does for them what it is reasonable to suppose their parent, if in life, would do, and what is for his family's interest and honor. The ordinary is the chosen organ to exercise this authority, and he cannot delegate it to another; but it seems that, where the trustee has exercised it fairly and properly without the consent of the ordinary previously given, and where prompt and regular annual returns of his action in that behalf have been made, the ordinary, by his approval of such returns, may ratify the action. No decision of the court has gone further than this. 15 *Ga.*, 451; 20 *Id.*, 325; 29 *Id.*, 582; 61 *Id.*, 452. In *Hayne vs. Dunlap*, at the present term of the court, this question arose incidentally, and we construed §1824 with §2540 of the Code, and concluded that, under the authority given in each of them, neither a guardian nor an administrator, who had paid all just debts and claims of every sort against the estate of his intestate, and had left in his hands assets or property belonging to minor heirs, for whom no guardian had been appointed, or for whose guardianship no one applied, could appropriate to the support of his ward or such minor heir, without the approval of the ordinary, more than the income of his estate. In the 59 *Ga.*, 795, the present Chief Justice said, in pronouncing the judgment of the court: "It appears that the *corpus* of the estate was encroached upon by the guardian without any order of the court therefor, which is against the statute. That allows it to be done on the approval of the ordinary. Code, §1824." The case in the 55 *Ga.*, 90, holds that, on a settlement between guardian and ward, the guardian may show "all reasonable

disbursements and expenses suitable to the circumstances of his ward ;” and if, in the series of years in which he has managed his ward’s estate, he has not expended the *corpus*, he cannot be held responsible for the profits or interest of the estate, though he may have spent for his ward more than the profits and interest of a given year, in that year, or less another year ; provided, during the whole period of his guardianship, he has not expended more than the entire interest, and has disbursed it reasonably and suitably to the circumstances of his ward, and legally in other respects. This judgment was also pronounced by the present Chief Justice, who seems to have steadily kept in view the restrictions upon the power of guardians and administrators to exceed the income of wards and minor heirs. This bench is unanimously of opinion that there should be no further relaxation of these prudent and salutary restraints. No case can be found which goes to the extent of shielding an administrator or guardian from responsibility, where he has shown himself so derelict to duty and so unmindful of his obligations as in the present case.

In addition to other shortcomings already noticed, this administrator kept no accounts against these minor heirs for board, tuition, nursing, clothing, etc., during the long time they remained under his care. In the last of his returns received and allowed by the ordinary, he is credited with two thousand one hundred and twenty-four dollars (\$2,124), for three and a half years’ board and servant hire for these three minors. The charge is unsupported by a single voucher, and not one item of this large amount is given. In returns prepared for subsequent years but never received or approved, and a portion of them not even sworn to, similar charges appear. In this way this estate, both principal and income, has been entirely absorbed, in violation, as we think, of every principle of right and justice recognized and enforced by the law.

3. That regular returns, received and approved by the ordinary, are only *prima facie* evidence in favor of the

administrator or his securities, will not be questioned ; and there is just as little doubt that others, made out with a view of presenting them, but which were never received or approved by the ordinary, and some of them not even verified, while they may be used as admissions by the plaintiff in this action, are not evidence in favor of the defendants or of their principal, unless their correctness is satisfactorily proved by other testimony. It was made the duty of the administrator, by law, to keep these accounts, to support them by proper vouchers, and to present them annually for examination and approval by the proper authority, and no one but himself, and those engaged for his fidelity could suffer detriment or injury in consequence of his failure. "It is an imperative duty of an accounting party, whether an agent, a trustee, a receiver or an executor (for in this respect, as was remarked by the Lord Chancellor, in Lord Hardwick *vs.* Vernon, they all stand in the same situation), to keep his accounts in a regular manner, and to be always ready with his accounts ; neglect of this duty is a ground for charging him with interest on balances in his hands and with cost. So a trustee and executor is bound to render every necessary information that is required of him ; and he who, undertaking to give information, gives but half information, in the view of a court of chancery conceals ; if he has not all the information necessary, he is bound to seek for it, and if practicable, to obtain it." 2 Spence. Eq. Jur., 921. This glaring omission of duty can scarcely be supplied by an attempt to prove a *quantum meruit* as to board, in this case, by the keeper of a hotel or fashionable city boarding-house, who, it is fair to infer, furnished much more sumptuous fare than the plaintiff is shown by this record to have received from this administrator, and by similar proof as to other things alleged, but not proved to have been furnished. If this is good law, and we entertain no doubt that it is, it follows that there was error in the charges excepted to upon this subject.

How far this omission may be supplied by proper proof

of this character, we do not fully determine. The character and quality of the board furnished, of the clothing, etc., supplied, may be proved by one acquainted with the worth of them, at the various times when furnished, but the amounts allowed as credit on this account must not exceed the annual income of plaintiff's property during his minority; and if he rendered any services to the administrator or his wife, in keeping bar or shop, or in any other way, the value of such services must be deducted from the defendants' charges for supplies. If all the income from his estate was not consumed in this way, then the defendants must likewise account for the excess.

4. We do not think that the plaintiff admitted on the stand, as claimed by defendants' counsel, his willingness to pay the demand set up by them, for his board maintenance, etc. He only expressed perfect willingness to allow the defendants such an amount as he would have been willing to have allowed the administrator for support, maintenance and education; was willing to allow him such sum as would be reasonable and proper, for what he furnished while he lived. He thought the services rendered the administrator and his family worth his food and lodging.

5. The plaintiff put in evidence an incomplete return of the defendant as an admission. This return had folded in it various receipts, accounts, etc., referred to as vouchers therein. These papers he objected to putting in as his evidence, but was compelled by the court, over his protest, to do so, upon the idea that they were a part of the admission. In this, we think, there was error. The rule upon the subject is, that when an admission is given in evidence, it is the right of the opposite party to have the whole of it, and everything connected therewith. Code, §3791. That is, when the plaintiff had given in the return as an admission, if the defendants could have shown that the enclosed papers were either a part of the admission, or were connected therewith, they might have given them in.

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The plaintiff declined to do so, because he desired to assail them, which he could not have done had he made them his evidence.

6. We perceive no error in admitting testimony to sustain the credit of the witnesses for either side, whose veracity had been assailed in any of the modes pointed out in the Code.

7. We deem it unnecessary to notice other exceptions in the record. Under the circumstances, it would be improper to enter into an analysis of the testimony, and to specify more particularly than we have already done, why the verdict should be set aside, and a new trial granted, because it is contrary to law and evidence.

Judgment reversed.

BURGE et al. vs. HAMILTON et al., executors.

[This case was argued at the last term, and the decision reserved.]

1. A will was executed on July 18, 1881; as offered for probate, it was written on ten pages; pages 1, 2, 3, 4, 5, 7 and 9 were clearly numbered, and without alteration in the numbering; on page 6, the number appeared to have been changed from 5 to 6; on page 8, the number appeared to have been altered from 7 to 8; on the last page, the number at the top of the page had been altered from 11 to 10; at the bottom of this page was the number 11; the entire will was in the handwriting of the testator, and his signature was on each of the pages; each page contained a separate paragraph of the will. On the last page was written the following:

“I nominate and appoint David B. Hamilton, Judge George Hillyer and Eben Hillyer to be executors of this my will, to carry the same into effect according to law, and which will I have written on the above and foregoing pages, numbered from 1 to 11 inclusive, and identified by name on the margins, and hereunto subscribed my hand and affixed my seal for its due execution, this the 18th day of July, 1881.”

On the page preceding this, and numbered 9, was the residuary clause, leaving all the residue of the estate to a residuary legatee. In July, 1882, a codicil was executed, in which it was stated that it was a codicil to the will of July 18, 1881, and that said will was ratified, approved and declared to be the testator's “last will in

all respects, except in so far as the same is changed by this codicil;" it also referred to the witnesses to the original. This codicil was written by the attorney and confidential adviser of the testator, and its pages were numbered 12, 13 and 14. It referred to the subject-matter of certain of the items contained in the original will. This codicil was attached to the paper offered as the original will; and the two were offered for probate together, as forming the last will and testament of the testator: ●

Held, that the two papers together present an ambiguity as to the number of pages and the identity of the paper as propounded with the will as executed; and it was admissible to show by the attorney, who drew the codicil and was a witness to it, that the will, as then exhibited to him by the testator, was the same as that offered for probate; that it had only the same ten pages; that he read it over to the testator carefully page by page, to see what alterations were desired to be made by the codicil; that he took it home with him, at testator's request, to see that it should be all right, and that the codicil might be prepared so as to fit in with it; and that he mentioned to the testator the mistake in paging, who simply observed that it was a mistake.

- (a.) Such facts could be shown by the attorney who drew and witnessed the codicil, and being supported by adminicular proof of identity, it would warrant the jury in finding in favor of the will.
2. The following principles may be deduced from the decisions of the English courts, and the Code and decisions of this court do not conflict with them, but in many respects enlarge the scope thereof.
 - (a.) Parol evidence is admissible to explain ambiguities.
 - (b.) Also to show what papers constitute a will offered for probate, with the attesting clause and witnesses signing according to law.
 - (c.) Also to show the identity of the will with the paper propounded, by statements of the testator at the time of the execution, before the execution and after it.
 - (d.) Greater latitude is given to the admission of parol evidence on issues of probate than on the construction of the will after probate.
 - (e.) A codicil expressly affirming a will which could not convey realty or was illegally executed, if that codicil be legally executed, made the will valid, especially if annexed thereto.
 - (f.) A will identified in part will not be refused probate as to that part because of the uncertainty of other probable parts, the contents of which lost or missing parts are unknown.
3. Although a will as originally executed may have been altered by the testator after that execution, yet if republished by a codicil, by being referred to therein and annexed thereto, it is made valid thereby; and it may be proved by extrinsic evidence that the alteration was made before the codicil.
- (a.) *Revocavit vel non* is a similar question to *devisavit vel non*, and is a

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question of fact for the jury ; and declarations made prior to or at the time of the execution of the will or its revocation are clearly admissible.

4. Taking into consideration the circumstances of the case, it is morally certain that the will and codicil offered for probate contain the disposition and the entire disposition which the testator desired to make, and did make, of his property.
- (a.) The parts of a will identified would not fail of probate on account of a missing part whose contents were unknown ; and it not appearing in this case, if any part be missing, how far it would interfere with that which is present or in what way, a court will not destroy legacies before it.
5. The judge has the discretion, in trying issues in civil cases, to have the jury stricken from the grand jury list.
6. There was no error in the charge or refusal to charge on the subject of the will being unnatural. A husband and wife being one, her kindred become his, and legacies to them were not unnatural.
- (a.) In this case, it was more natural that the testator should give his property to his wife's kindred who grew up around him and associated with him—especially those whom he raised from infancy—than to those of his own kindred whom he rarely saw and scarcely knew.
7. There was not enough evidence on the issue of undue influence to raise a question about its exercise by anybody over such a man as the testator was, in the legal sense of undue influence ; and there was no error which hurt the plaintiffs in error in refusing to charge as requested thereon.
8. There was no error in ruling and charging to the effect that parol evidence could not change, add to or contradict a written will, but where there were ambiguities, whether latent or patent, they could be explained by it ; nor in refusing requests to charge to the contrary.
- (a.) There were ambiguities needing explanation, and it was proper to refuse to charge on the theory that there were none.
9. There was no error in the admission of parol evidence to identify the paper propounded as the will of the decedent.
- (a.) There was no error in the charges or refusals to charge which requires a new trial. The general charge was fair, and the issues were fully and fairly submitted.
10. Motions for continuance are in the discretion of the presiding judge, and unless that discretion has been abused and the ends of justice demand it, this court will not interfere with the ruling of the court below.
- (a.) It will not necessitate a new trial that the court refused a continuance, on the ground that a witness had not been examined by interrogatories and was under promise to be present and her pres-

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ence was desirable, where it appears that such witness was desired to testify on the question of undue influence, and that if her testimony were had, it would not, and ought not, to change the verdict.

- (b.) Nor will it require a new trial because the court refused a continuance on the ground that certain clients of the moving attorney had just been made parties, it appearing that they lived in other states and were infants, and could have been of little use on the issue of undue influence, and the great issues in the case being on legal questions—on the admissibility of the testimony of the attorney who drew the codicil to the will, on the admissibility of the testator's statements, on the words and figures of the will and codicil, whether plain or ambiguous; especially as it does not appear that any one of the absent clients was a lawyer or capable of aiding counsel in this case.

HALL, J., concurred.

BLANDFORD, J., dissented from 10th head-note and subdivisions.

June 10, 1884.

Evidence. Wills. Husband and Wife. Ambiguity. Continuance. Parties. Before Judge STEWART. Floyd Superior Court. March Term, 1883.

On August 7, 1882, D. B. Hamilton, George Hillyer and Eben Hillyer, as executors, propounded for probate a paper as the last will of Alfred Shorter, deceased, with a codicil thereto. They set out the names of a number of persons as being next of kin of the testator. Citation issued, and was served and published. A *caveat* was filed, on the grounds of undue influence, fraudulent practices to influence the testator; that he labored under a mistake of fact as to the conduct of his heirs at law; that he was between eighty and ninety years of age, and yielded himself to the wishes of D. B. Hamilton and his family, and refused them nothing, and that frauds were practiced by them in various ways; that letters written were never received; and that relatives were so treated as to be compelled to leave, etc.

The ordinary rendered judgment in favor of the will, and ordered it to be recorded, and caveators entered an

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appeal. On November 20, 1882, at the instance of the propounders, the judge of the superior court passed an order to have citation and service perfected on certain persons, as heirs at law and next of kin of the testator, who had not previously been named, and making them parties. One of the parties so named was a resident of Georgia; the others were living in Florida, Washington, D. C., and Arkansas, and were to be served by publication.

When the case was called, on March 28, 1883, a motion was made for continuance. (For the grounds, see the first ground of the motion for new trial.) This was overruled. The order overruling it recited that it appeared "that all parties interested have been made parties to the record in this case, and service having been duly perfected on them (as) heretofore required."

An order was taken, reciting that two of the caveators were minors, and T. P. Burge, one of the original caveators, was appointed guardian *ad litem* for them, and accepted the appointment. All of the caveators then filed an amendment to their *caveat*; and at their instance the court passed an order allowing this amendment and again making all the parties named parties to the case. (The chronological order of the orders making parties and the motion for continuance was a subject of difference in argument, but they appear in the record in the order stated.) Another amendment was also filed and allowed. The *caveat*, as amended, was to the whole will, on the ground that it was not the will of the testator and was not the same document referred to by him in the codicil; it was also to specific legacies, on substantially the grounds already stated, and because of an alleged alteration in one of the items.

It is unnecessary to recite the voluminous evidence in this case, further than to state that certain loose sheets, which appeared to have been a part of a will of testator, were introduced in evidence by the caveators. These were numbered 6, 7, 8 and 9. The first three were marked

“cancelled and subsequent will executed,” and signed by the testator, and the fourth sheet had marks drawn across it, and his signature thereon was erased.

The evidence of T. W. Alexander, Esq. (on which one ground of the motion for new trial was based), on the subject of the will and codicil, was substantially as follows:

I drafted the codicil 8th July, 1882. I received a message from Col. Shorter through Mr. Hamilton that he desired to see me about some business. The request was that I should go at my earliest convenience. I went immediately. I met Mrs. Hamilton at the door; told her I had come, at Col. Shorter's request, to see him. She invited me into the parlor. She then carried me into his room. I went in, and he said: “Martha, open my bureau or trunk.” Told her to get a tin box, which she did. He then told her to unlock it. She did so, and then left the room. Col. Shorter told me he had previously made a will; had sealed it in an envelope and put it in the box; that lately he had concluded to make two or three changes in it, and wanted me to prepare a codicil to the will. He picked up the will from the box, and said: “When I made the will I sealed it up and marked it as you see it is marked, and had no idea that I would change it.” He gave me the envelope, and asked me to break it and make the changes. He said that no one in the world knew what his will contained, and he requested that I would not disclose its contents to any one, as he did not want any one to know its contents until after his death. This envelope was directed to the ordinary of Floyd county, Ga.; it is the identical one he took from the tin box, and which contained his will. I broke it at his request and read the will over to him. He was lying on the bed. As I would read he would occasionally make remarks about certain legacies in the will; discussed several of them; some at considerable length. When I finished reading the will, he told me what changes he wanted. At a table by his bed side I made a memorandum of the changes. [Producing paper.] This is the paper and memorandum I made at the time. I intended and expected to prepare a draft of the codicil right there, but he remarked to me: “I wanted you to examine that will to see if it was properly drawn and executed to stand the test.” I examined it and told him that I could see no defect about it. He then remarked that he preferred that I take the will home with me, re-read it, and prepare the codicil there. After that I remained and talked with him perhaps an hour longer; I think that I spent at least two hours with him. After I got through with the business and concluded my visit, I left, bringing the will with me to town to my office. During the time I was there, we conversed on various topics. He was weak and lying on top of the bed. He was lying down during a

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portion of the time I was there; perhaps half the time. During the time, he got up and lit his pipe; he was an inveterate smoker. He said to me, "I can't offer you a pipe." But he walked to the wardrobe and got a box of cigars, and I took one. We talked about various things, but mainly about this will and the disposition of his property. I will give details as well as I remember. He mentioned that he had given the college a certain amount of money. That, of course, could not be used as it was. He said, "I know they need funds for apparatus and about fixing the halls," and said, "I want to give the college five thousand dollars in addition; and I want that arranged so that it can be used immediately, under the direction of the president." He said, "I want to give the college five thousand dollars so that it can be used immediately." That he wanted to turn over the five thousand dollars before his death, if he had the funds on hand to do it with. He told me also that he had a relation by the name of Mrs. Ansley, who was in poor health, or her husband was, and that he wanted to assist her; that he wanted to give her five thousand dollars. He also said that she had a daughter at Shorter College; that he had heard the teachers speak of her in a very complimentary way, and that he wanted her to have a thousand dollars to complete her education. In reference to Milton Cooley, he said: "I gave Cooley a legacy, but since that time he has died. He asked me what was best in the matter; said that he didn't want to give it to Mrs. Cooley, so that the children and she could squander it; wanted to put it in the hands of a trustee, so that the family would get the benefit of it. I suggested to him that he could appoint a trustee. He suggested Dr. Hillyer. I told him that I thought it would do very well. He told me that he had been settling with the Cooley and Harper children, and within the last two or three years had paid over to them about thirty thousand dollars—three thousand each—except Milton Cooley, who was entitled to three thousand dollars. He said: "I have not paid him, but have a bond with an accumulation of three hundred dollars interest, which has never been paid him nor his family." I said to him: "I see in your will you have not arranged about the selling of the three thousand dollars in bonds. Your executors may feel embarrassed by this omission. It is best for you to provide for that." And it was so done in the codicil. I believe those are the three provisos he made in the codicil that I now remember.

Q. "In whose handwriting is the original will, in the body of the will?"

A. "I had a conversation with him on that subject. I saw that the whole of it was in his own handwriting—all except the signatures of the witnesses. This was the part of it not in his own handwriting. I said to him: 'I see that this will is in your own handwriting.' He said, 'Yes,' that George Hillyer had drawn a will for him before,

and that he had drawn it from that. I took it that he had drawn it in the form of the will that George Hillyer drew for him. In reading over the residuary clause, he spoke of Mrs. Hamilton. After reading that residuary clause, Mr. Shorter, of his own volition, introduced the subject of his kind feeling for Mrs. Hamilton, and remarked to me that he and his wife raised her, I believe was his expression; that she had lived with them all of her life, and made this assertion: 'I have as great love or affection for her as you possibly can have for one of your daughters.' That was about the substance, and almost the language he used. . . . From his conduct and conversation on that occasion and the manner of his delivery; the way he demeaned himself in that respect, I discovered not the least diminution in his mind between that and any other period of his life, so far as the business in hand was concerned, and that is all we have to do with. I remember having this impression on my mind when I went there, finding him on his bed: I thought that I would see whether there was any failure in his mind, and I talked with him for that purpose, and I decided in my own mind that he was as competent as anybody could be, except so far as his physical condition was concerned. His mind was clear. I brought the will to my office, and the memorandum I had, according to his request, and prepared the codicil. Before I left his house the question came up, and I said to him, 'Mr. Shorter, it will be necessary to have three witnesses to the codicil, as to the will, and as you seem anxious to have this attended to, I will prepare it and be back on Monday morning at nine o'clock.' . . . I met Dr. Holmes at the door, and told him what had occurred in reference to the execution of the codicil, and told him to come out Monday morning; that Mr. Selkirk would be there, so that we could witness it without any inconvenience. On Monday morning I saw Dr. Holmes, and he proposed to take me out to Colonel Shorter's in his buggy. We went out there at nine o'clock. The remark was made by Mr. Shorter that we were very nearly on time. Mr. Selkirk was there. I asked him and Dr. Holmes to walk in Mrs. Hamilton's room till I could see Mr. Shorter. I went into Colonel Shorter's room and read the codicil to him. I went in, closed the door, and read the codicil to him, and it was all to his satisfaction and purpose. I then went into the room where Mr. Selkirk and Dr. Holmes were, and brought them into Mr. Shorter's room. Mr. Shorter was lying on the bed then. There was a little table near the bed, and the paper and a pen lying on it. Mr. Shorter got up. I handed him a blank book, and he wrote his name at the proper place for the execution of the codicil, and on the margin of each of the pages, Dr. Holmes, Mr. Selkirk and myself witnessing the operation. I forget if Dr. Holmes signed first, but we three signed it in three feet of his bed. This is the paper in my handwriting. I was going to explain that, when the signatures had all been attached, I attached

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the codicil to the will. I had taken some fasteners out there for the purpose of attaching it to the will when it was signed. I attached it upon the table."

Q. "You mean you attached this codicil to the will?"

A. "Yes, sir. I understand that it has been detached sometime since the probate. It was attached then. I folded it up, put it in an envelope at Mr. Shorter's request, and that is the envelope that put it in. [Identifying envelope.] It was sealed up in his presence and in the presence of the others. This is the direction, "Last will of Alfred Shorter." Addressed to "Henry J. Johnson, Ordinary of Floyd County." He told me that he wanted it addressed as the other paper was, and it was addressed that way. I left it lying on the table. I don't remember about that. It was either left on the table or handed to him. We three remained in the room in conversation for a considerable length of time. I was there that morning more than an hour—perhaps an hour and a half. It was left there with Colonel Shorter. The next time I saw it, it was in the office of Mr. D. B. Hamilton. On the morning after Mr. Shorter was buried, I went to that place and met Mr. Johnson, the ordinary, Dr. Hillyer, Judge Hillyer and Mr. Hamilton. Mr. Johnson handed the package containing the will to me. I found it sealed up as it was at Mr. Shorter's house. I was requested to open it, and I did so."

Q. "Who asked you?"

A. "Mr. Johnson. He asked me to open it and see if it was the identical paper. I opened it, read it and recognized it to be the identical will. I read it out and recognized that it was the same will that I had read at Mr. Shorter's. At the time of executing the codicil, testator was as rational upon all subjects as he ever was. I will mention another thing which I had forgotten to state. Upon this occasion, seeing that there was reference in the will and codicil to a little book, or to a book to which Mr. Shorter referred, I remarked to him that it might be important at some time or other to identify that book, and I would like to see it and examine it. I think that was on the morning of the execution of the codicil, before these other gentlemen had come in, however. He then got the book out of the same little box from which the will had been taken (I recognize that book you had as the one), and handed it to me. . . ."

Q. "I believe you said the body of the will was in Colonel Shorter's handwriting?"

A. "Yes, I recognize it as such. I have had a great deal of acquaintance. I have seen him write a great deal. I didn't examine it critically at the time. I have since. There is not a word of it that purports to be in his handwriting that is not in his handwriting, in my opinion. The word 'Forty,' in the Beeland bequest, alleged in the *caveat* to have been originally 'Seventy-five,' never attracted my attention nor impressed itself on my mind at all, except that I knew

that the bequest to those heirs was forty thousand dollars. Another thing: I asked Mr. Shorter at the time—I said: ‘Who is Mrs. Beeland?’ I didn’t know he had a kinsman by that name, and he mentioned the fact that Mrs. Beeland was his sister. I recollect that the word ‘forty’ was in the will then as now. I read it forty, and I have got another evidence that there can be no mistake about it.”

Q. “State whether that word ‘forty’ is written by Colonel Shorter or by some other man?”

A. “Yes, sir; that is his handwriting, the same as the body of the will. . . .”

Q. “In the latter part of the will, the language is: ‘The above and foregoing pages numbered from one to eleven’ or ‘ten,’ or whatever it may be, ‘and identified by my name on the margin.’ I notice that you numbered the codicil from twelve on.”

A. “Yes, sir.”

Q. “I will ask you if that will just read is the same will read to Col. Shorter—that Col. Shorter produced to you on the occasion testified about, and which was read over in his presence?”

A. “Yes; I remember that, after going back there with the codicil, I said, ‘I see that you have numbered your will from one to eleven.’ I told him that I had counted the pages and only found ten. He said, ‘I made a mistake in the numbers.’ I counted the pages and the number was ten. The figure is eleven. That is the identical paper.”

Q. “Is there any page out of the will now which was there when it was read by you to Col. Shorter?”

A. “No. It is the same in whole. If it was taken out from the time I got it from him, I must have taken it out. I did not take it out. I called his attention to the fact that he had recited that there were eleven pages, and there were only ten pages in the will. He said that it was a mistake of his own. . . .”

I drew the codicil to Col. Shorter’s will; Mr. Hamilton never spoke to me in his life in reference to Col. Shorter’s will, until he asked me to go out there. I had no conversation with him at any time on the subject of the account book. I called Col. Shorter’s attention, when I read over the codicil to him, to the fact that there was a book referred to, that I might be able to identify it, and he reached over and got it out of the box on the bed. Never had any conversation with anybody upon the subject of Col. Shorter’s will before the morning Mr. Hamilton requested me to go out, except that, long before the 18th of July, 1881, Maj. Ayer told me he witnessed a will made in 1878. I am confident that the will now read, and the writing and the provisions contained therein, are the same now as when I read the will over to Col. Shorter. I got it from Mr. Johnson as I gave it to Col. Shorter. I called Col. Shorter’s attention to the fact that in his attestation clause it read from 1 to 11; that I had counted the leaves and there were only ten pages. He said perhaps he was mistaken in that. I

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read it as eleven. There were no changes made in the will by anybody while it was in my possession. Col. Shorter made no changes while it was in my possession. Mr. Shorter didn't have the will in his hands after I went back there. I attached the codicil to it, and put it in an envelope, directed it to the ordinary, sealed it up, and handed it to Col. Shorter. Col. Shorter said he had sealed up the package (in which he had his will), and never expected a change would have to be made, and never expected it to be opened until after his death, but it had become necessary for him to make a codicil."

In explanation of some of the other grounds of the motion, it may also be stated that Mrs. Hamilton, who was the residuary legatee, and her brother, C. M. Harper, had been taken by the testator when children, and raised as his own, they were the nephew and niece of testator's wife, and lived with him a large portion of their lives, and Mrs. Hamilton was with him in his last sickness. Hamilton, who married one of these legatees, was a lawyer, and attended to business for Col. Shorter. The bulk of testator's property was given to relatives of his wife; and it appeared that he had been more intimately associated with them than with his own relatives.

The evidence showed that the testator, Alfred Shorter, had a mind of uncommon strength, and a will of unusual power; that he was able at all times, even to the immediate approach of death, to give direction and control to his purposes; and that his mind was clear and unobscured. The other evidence is sufficiently stated in the decision.

On the trial, the jury found for the propounders. Caveators moved for a new trial, on the following grounds:

(1.) Because the court erred in refusing and overruling the motion made by counsel for the caveators for a continuance of the case, which motion was submitted in writing, and verified by the oath of A. R. Wright, one of the attorneys for caveators, in the following words, to-wit.:

"OPEN COURT, FLOYD COUNTY, GEORGIA, March 27, 1883.

"In the matter of the probate and *careat* of the will of the late Alfred Shorter, deceased, Augustus R. Wright, one of the counsel employed, upon consultation with associate counsel, states that they are

not so ready for trial and well prepared as justice to their clients requires, and for cause of continuance, shows that Mrs. Richardson, of Cherokee, Alabama, is a material witness for caveators, and from a letter received, is sick at Gadsden, Alabama; that her testimony was discovered last week, too late for interrogatories, and that Mrs. Richardson [cannot] come to the trial in person; that upon hearing that she would probably be a good witness for caveators, having been the wife of Capt. Alfred Shorter Truitt, now deceased, a favorite nephew of the late Col. Alfred Shorter, he, the said Wright, took the boat and went to see her at her residence in Alabama (other counsel being busy in other directions.) She told the said Wright, while the wife of Capt. Truitt at Col. Shorter's house, her treatment was such by Mrs. Shorter and her kin, especially Mr. Hamilton and his family (and excepting Dr. Hillyer and his wife, whose conduct was always cordial), that she refused to accompany her husband on his visits; that it was evident to anybody that they were jealous of any of Col. Shorter's kin, to whom he seemed to take any particular liking. Capt. Truitt was so treated before the war; he went to California, and it was only after long entreaty by letters and promises, he consented to come back. Witness stated much of letters and correspondence between herself and Mrs. Shorter, after her marriage with Capt. Truitt, in which she stated Mrs. Shorter accused her of wanting Col. Shorter's property, to which witness most indignantly replied. This witness is not absent by our consent or procurement, but, on the contrary, we were certain of having her present, until informed she was sick at her brother-in-law's, Col. Kyle's, in Gadsden, Alabama.

"Further, interrogatories were taken out for Mrs. Mallary, of North Carolina, and have not been answered, witness declining to answer them; that she is related by blood, as he is informed, to some of the propounders of the will. He has been informed, and believes, that Mrs. Mallary had said Mrs. Hamilton was not the favorite of Col. Shorter at all, among the nieces of Mrs. Shorter, but that Mrs. Brooks was his favorite and loved one, and that he regarded her as the most excellent of all his wife's kin, and one of the most excellent of earth, and spoke in praise of her as wife, mother and Christian. It was to know whether she had so said, and what she knew on that and other subjects, that interrogatories were sued out.

"And for further showing, he says he has not time enough in which to prepare his case as he thinks the justice of it requires; our clients with whom we have had intercourse are scattered in various parts of the United States, many of them we have had no chance to see, some in Arkansas, some in Texas, some in Mississippi, some in Florida, some in Washington, D. C. We have been continually getting facts by correspondence and otherwise. Counsel have been active and industrious; other cases on the docket have had precedence of

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it, and it was only on Saturday last counsel were notified that a judge would be here to try this particular case, when some of the counsel desired other cases, and which were in order and had precedence according to law, to be tried in pursuance of the same. Counsel now desire time to go to Shelby, North Carolina, and to talk with Mrs. Mallary, who declines to answer interrogatories exhibited to her; it may be of the utmost importance in this case."

[On cross-examination, counsel'who made the showing stated the following, among other things :

Q. "Judge Wright, didn't we notify you in writing, three or four weeks ago, putting you upon notice that we would be ready for trial at this term?"

A. "It seems that you wrote to me to that effect, but it didn't have any effect, because I was doing my best. I was spending a good deal of time, and Col. Shorter was spending a good deal of time and money to get ready."

Q. "State your first knowledge of this?"

A. "Col. Shorter and myself were talking about her (Mrs. Richardson), and we thought probably she knew something about it. As the time approached I told Col. Shorter that it might be possible that she had better be seen, and told him that we had better see her. I think he said, You go and see her and I will probably go to La-Grange. I went there last week; didn't know what Mrs. Richardson would swear till I saw her; I then knew that I had struck an important witness."

Q. "Didn't I propose to you, that if you would make out any set of interrogatories, that I would cross them for you without delay?"

A. "I think you did."

Q. "Couldn't you have made out interrogatories for Mrs. Richardson and taken them down with you when you went?"

A. "I didn't know whether she was of value—I was seeking testimony."

Q. "You took out interrogatories for Mr. Mallary?"

A. "Yes."

Q. "How did you find out that he knew anything?"

A. "It would be a pretty difficult matter to tell you. I never corresponded with him or Mrs. Mallary."

Q. "How came you to take out interrogatories for her?"

A. "In consequence of something that occurred between her and Col. Shorter here, when she was here."

Q. "She has been gone some months?"

A. "I don't think so."

Q. "No attorney on your side corresponded with her?"

A. "I think not."

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Q. "Judge Wright, when did you first know that Mrs. Richardson was probably an important witness?"

A. "Col. Shorter corresponded with her on another subject two or three months ago. We talked about it, and seemed to think it not important. We afterwards concluded that it might be important to go there; this conclusion was just before I went down."

Q. "There was nothing contained in the correspondence of Col. Shorter and the lady to draw your mind to it; you knew as much as you knew at the time of going down?"

A. "I think there was a floating rumor that she might be an important witness. I think I got it from Mr. Harper. I came to the conclusion that a diligent lawyer should know by seeing her."

Q. "I am trying to see whether you used due diligence?"

A. "I think I did."

The propounders made a counter-showing, and introduced C. M. Harper and D. B. Hamilton to show that Truitt went west; that Hamilton did not live at the house of Col. Alfred Shorter when Truitt was there; and that the relationship between him and Truitt and between Harper and Truitt was most pleasant; that Col. Shorter died July 18, 1882; and that the proceeding to probate in solemn form was presented, a *caveat* filed, a motion to continue made before the ordinary to procure testimony and to prepare the *caveat*. Also that the commission attached to the interrogatories for Mrs. Mallary was issued March 12, 1883.]

(2.) Because the court erred in requiring the jury to try said case to be stricken from the grand jury, over the objection of counsel for caveators, both traverse juries being present in their boxes, and not otherwise engaged.

(3.) Because the document propounded as the last will and testament of Alfred Shorter, deceased, shows upon its face that it is not the whole will, and not entitled to probate, it being expressed in the instrument so offered as the original will, bearing date July 18, 1881, that it is written on pages numbered from 1 to 11 inclusive, when in fact that original will, as here presented for probate, is not written on pages numbered from 1 to 11 inclusive, but on 10 pages only, and the language of the codicil made

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by said Alfred Shorter, dated July 10, 1882, and here presented for probate with the original will, so far as it relates to the ratification and republication of said original will, being as follows: "Being still of sound and disposing mind and memory, I, Alfred Shorter, do make the following codicil to the will made by myself on the 13th day of July, 1881, and attested by W. F. Ayer, J. C. McDonald, and J. B. Hine. Said will is now ratified, approved, and declared to be my last will in all respects, except in so far as the same is changed by this codicil." "The preceding three pages numbered 12, 13, 14, contain a codicil to the last will and testament of Alfred Shorter, executed on the 18th day of July, 1881, and are identified by his own signature on the margin." Therefore, the codicil ratifies and republishes the original will as made and executed on the 18th day of July, 1881, except so far as the same is changed by the codicil, and not the document, as now presented for probate.

(4.) Because the court erred in admitting the evidence of T. W. Alexander, over objection of counsel for the caveators, stating the conversation between himself and Alfred Shorter, and what was said and done by each of them on the 8th day of July, 1882, and on the 10th day of July, 1882, as stated in said Alexander's testimony, the court holding that said testimony was admissible to show the condition of testator's mind, his motives and purposes in making his will, and to identify the document, or that it was recognized by the testator as his will, the objection being that such testimony could not be heard to alter, vary, add to, take from, or contradict the written instrument or will. And caveators excepted to that portion of said Alexander's testimony as to what said Shorter said to him about his affection for Martha Hamilton, more especially.

(5) Because the verdict is contrary to evidence, and without evidence to support it.

(6.) Because the verdict is decidedly and strongly against the weight of evidence.

(7.) Because the verdict is contrary to law and evidence, and without any sufficient evidence to support it.

(8.) Because the jury found contrary to the law and the following charges of the court, to-wit: "If Alfred Shorter states in his will that the same is numbered from 1 to 11 inclusive, then parol evidence would be inadmissible to change or alter the number of pages as written." "Any statements made by testator, if any were made, to Col. Alexander, at the time of making the will, would be parol evidence." "Whatever might be the effect of the republication of a will by a codicil, generally speaking, or where the language used by the testator might be not inconsistent with an intention to adopt any alterations made since its first publication, whatever may be the effect in such case, generally speaking, as to adopting any changes made in the will after its original execution, no such intention to adopt such alterations can be inferred or even made out by parol evidence, if such parol evidence would change, add to, or contradict the writing."

(9.) Because the court erred in charging the jury as follows: "Caveators allege that Alfred Shorter made a will in 1881, and after said will had been signed and executed, he took from said will a part of the same which contained a devise in favor of Shorter College, and they insist that he inserted in said will another and different devise; all of which caveators insist was done when no witnesses to the will were present. I charge you that if this be shown by the evidence, then such an act would amount to a cancellation of that provision of the will so taken therefrom, and would cancel the entire will, if the cancellation of that provision would destroy the entire testamentary scheme; but if the destruction or cancellation of that part would not destroy the testamentary scheme of the testator as to the disposition of his property, then the remainder of the will would not be annulled by such

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conduct. While it would be true that such change of a part of the will would annul that part of the same, yet if the testator, after making the will of 1881, took any parts of the sheets of the paper containing certain devises, and substituted others, and if the evidence should show that, after doing this, he made a codicil to the same will as changed by him, and if in said codicil he re-affirmed and republished said paper, as changed, as his will, then the effect would be to make said writing his will, and it would make no difference that such writing purporting to be the will of 1881, had been changed, if in truth the will as changed was re-affirmed and republished by the codicil."

(9½.) Because the court erred in charging the jury as follows: "Caveators further insist that said Alfred Shorter, after making his will, changed a bequest which said will contained, of \$75,000.00 to \$40,000.00, and that the same was done not in the presence of the witnesses to said will. If this be shown by the evidence, without more, I charge you that such change would render null and void that devise or bequest of the will. But if no such change was made, or if made, if testator, after making such change, made and executed in due form of law a codicil to his said will, as changed, and if in said codicil he re-affirmed and republished his will, then such republication would make the whole will legal and valid in its then condition; that is, if said will, at the time of making the codicil, contained a bequest of \$40,000.00 which had been changed from \$75,000.00, then the bequest of \$40,000.00 would constitute a part of said will."

(10.) Because the court erred in refusing to give the following in charge, as requested in writing by the counsel for caveators, to-wit: "If the testator has blood kin who could inherit, if he died intestate, any disposition of the main bulk of his property to others, not of the blood, is regarded by the law as an unnatural will, and more subject to suspicion and scrutiny than a will transmitting the property in the line of the blood or line of descent." The

court leaving out of its charge that portion of the above contained in the following words: "Is regarded by the law as an unnatural will, and."

(11.) Because the court erred in refusing to give in charge to the jury the following, as requested in writing by counsel for caveators, and in giving what he substituted therefor: "Donations in a will to the wife or children of a man who is the general and confidential agent and attorney at law of the testator, who has the general management, not only of testator's legal business, but of his other business in general, labor under the suspicion of having been obtained by an abuse of the influence such agent may have over his principal, the testator; and the more especially so if the donation be an extravagant one and to a person outside of the line of the blood or line of descent."

The court substituting for the above the following charge: "Donations, in a will, to the wife or children of a man who is the general and confidential agent and attorney at law of the testator, may be looked to by you to determine whether the will be natural or unnatural, and if unnatural, then the same would be under the suspicion of having been obtained by an abuse of the influence which such an agent may have obtained over his principal, and the more especially so if the donation be an extravagant one, and to a person out side of the line of the blood or line of descent." And caveators say that the court erred especially in making the suspicion attaching to such a donation depend upon its being, in the opinion of the jury, unnatural.

(12.) Because the court erred in refusing to give the following in charge to the jury, as requested in writing by counsel for caveators, to-wit: "If a party has such influence over a testator as to be able to control him in regard to the provisions of his will, and there are constant opportunities to exert that influence before and at the time of the making of the will, and the will makes unreasonable and extravagant provisions in favor of that party, or in favor of any member or members of the family of such

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party, the inference is legitimate that it may have been the result of such influence. It is for the jury to determine whether it was or not."

(13.) Because the court erred in refusing to give in charge to the jury the following, as requested in writing by counsel for caveators, and giving what he substituted therefor: "Whatever might be the effect of the republication of a will by a codicil, generally speaking, or where the language used by the testator might be not inconsistent with an intention to adopt any alterations made since its first publication (as when he says in a codicil that he republishes a will 'bearing a certain date,' or, 'the foregoing will,' or, 'the foregoing pages,' or like language), whatever may be the effect in such cases, generally speaking, as to adopting any changes made in the will after its original execution, no such intention to adopt such alterations can be inferred, or even made out, by parol evidence, in a case like this, where to do so would conflict with the statement made and language used by the testator in making such republication in and by the codicil. To allow the republication in this case to set up and adopt material changes, such as the removal of whole pages, and inserting other page or pages, if the pages removed contain important provisions other than and different from the provisions contained in the page or pages so inserted, it would conflict with the statements made and language used in this codicil."

The court gave in charge the foregoing, except what is included in parentheses, until he came to the words "or even made out by parol evidence," giving said words in charge, together with that portion so requested that precedes, and refusing the balance contained in said request; but substituting for the balance these words, which he added to what he did give, to-wit: "If such parol evidence would change, add to or contradict the writing;" and caveators say the court more especially erred in substituting the words, "If such parol evidence would

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change, add to or contradict the writing," in lieu of all the latter part or balance of said request.

(14.) Because the court erred in refusing to give in whole the following charge, as requested in writing by counsel for caveators, and in substituting and adding what he did give in lieu of a part thereof and in addition thereto, —the request to charge being as follows: "If the jury believe, from the evidence, that the will made and executed by Alfred Shorter, on the 18th day of July, 1881, witnessed by W. F. Ayer, J. C. McDonald and J. B. Hine, is set forth on and consists of the several pieces of paper now in evidence, marked and identified as pages 1, 2, 3, 4, 5, as contained in the instrument propounded for probate, and the pages marked and identified as pages 6, 7 and 8; said pages 6, 7 and 8 being further identified by having written across the face of each, these words. "Cancelled; and subsequent will executed. (Signed) Alfred Shorter," said pages 6, 7 and 8 not being contained in said instrument so offered; and also of the page now marked and identified as page 10; said page 10 being contained in the instrument so offered for probate, and said page 10 being further identified by the changing of 11 to 10 on said page (if they find said change was made). And, if the jury believe that said will also contained one other page not offered in evidence, and its contents not being shown, then they must find by their verdict that the instrument in writing now propounded for probate, if materially different, is not the last will and testament of Alfred Shorter, unless it be further shown that it was afterwards republished, or published as required by law. But the republication in the codicil, in this case, made in the language therein used, will not have the effect to adopt and set up any such important changes made, if they were made, in the will of July 18, 1881, after that date and before the making of the codicil."

The court gave that portion of the above which precedes and includes the following words: "If materially differ-

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ent, is not the last will and testament of Alfred Shorter," substituting for the balance the following: "But if said will did originally consist of part of the will offered for probate, and part of other sheets of paper in evidence, or of sheets not found and not in evidence; yet, if, after making the will, the testator took from the will the sheets in evidence, marked cancelled, and other sheets, and if he substituted other sheets containing other and different bequests, and if the will thus changed, if such change took place, be re-affirmed and republished as his will, as changed, then such republication would make the will legal and valid."

(15.) Because the court erred in refusing to give in charge to the jury the whole of the following, as requested in writing by counsel for caveators, and in substituting and adding these words: "Put whether the writing contains the number from 1 to 10, or from 1 to 11, would be for you to say from all the evidence," in what he did give in lieu of a part thereof and in addition thereto. The request to charge being as follows, to-wit: "In considering the question as to whether the document presented by the propounders as the will of Alfred Shorter, made July 18, 1881, is or is not, in whole or in part, the same document he in fact made and published on that day, and the same he republished in the codicil of July 10, 1882, as his will; if Alfred Shorter states in his will that the same is written on pages numbered from 1 to 11 inclusive, then no parol testimony can overcome what the will itself says as to the number of pages it was written on, and the court charges you that all that Col. Alexander, or any other witness, testifies as to what occurred or was said by Alfred Shorter, or between himself and Alfred Shorter, is parol testimony, and such as cannot be allowed to overcome what the will itself says as to the number of pages. Giving the weight which the law gives to the written statement contained in the will itself that it was written on pages numbered from one to eleven inclusive, if the jury shall find that the in-

strument presented by the propounders for probate was not written on pages numbered from 1 to 11 inclusive, and is not the will Alfred Shorter so made and executed, then the rule that parol testimony cannot contradict the writing applies again, when you come to consider whether Alfred Shorter, in making his codicil, did or did not ratify and republish the will as changed and altered, if you find it had been changed or altered. Said Alfred Shorter states, in the codicil to his will, that he ratifies the will he had made and executed on the 18th day of July, 1881, witnessed by W. F. Ayer, J. C. McDonald and J. B. Hine, except so far as changed by said codicil. The court charges you that no parol testimony can be allowed to contradict that statement made by Alfred Shorter in the will itself, nor to show that said testator meant to set up as his will what he had made or done after the 18th day of July, 1881. No amount of parol testimony can be considered for the purpose of contradicting either of these statements made in the will and codicil. Nothing can be probated in this proceeding, except the will he in fact made on the 18th day of July, 1881, without change, except as changed in the codicil, and this must be so, whether he was or was not unduly influenced in making his will, or any part of it."

The court gave that portion of the above preceding the words "numbered from 1 to 11 inclusive, then" and including those words, but refused the balance of said request, and gave as a substitute therefor and in addition thereto the following, to-wit: "Parol evidence would be inadmissible to change or alter the number of pages as written, but whether the writing contains the numbers from 1 to 10 or from 1 to 11. would be for you to say from all the evidence; any statements made by testator, if any were made, to Col. Alexander at the time of making the will would be parol evidence."

(16.) Because the court erred in refusing to give in charge to the jury the following, being requested in writing by counsel for caveators to do so, to-wit: "Alfred

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Shorter, the testator, having made the written statement in the codicil that he ratified the will made and executed by him on the 18th day of July, 1881, if, after July 18, 1881, any pages containing important provisions, materially different from what was taken out, were put in, then the republication by the codicil cannot make it a good will as it stands, so altered and changed, even though you should believe said Alfred Shorter made the changes himself; for to allow the act of republication to set up what was done afterwards, when he says himself in his codicil that it is what was done then, on the 18th of July, 1881, that he ratifies, except so far as changed by the codicil, would be to make him do another thing, and not the thing he says he does in the writing. His written language used in making the codicil will not allow other changes of the will he made July 18th, 1881, except the changes made by the codicil. No conversation or other thing that occurred between Alfred Shorter and Col. Alexander, on the 10th July, 1882, when the codicil was made, or on the Saturday prior thereto, or on any other day, as testified to by said Alexander, can be used or considered to contradict or change the statement in the will as to number of pages, nor the statement in the codicil, ratifying the will made July 18, 1881.

(17.) Because the court erred in refusing to give in charge to the jury the following, being requested by counsel for the caveators to do so, to-wit: "If they find that Alfred Shorter states in the instrument propounded as his will, that it was written on pages numbered from 1 to 11 inclusive, and that the will as originally executed and published, and also as ratified and republished by the codicil, contains this statement as to the pages it was written on, the republication being a reiteration as though testator had rewritten that statement on the day he executed the codicil, the fact that it was written on pages numbered from 1 to 11 inclusive, as stated in the instrument itself, cannot be contradicted or overcome by

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any amount of parol testimony. No parol testimony to the effect that it was examined when republished and found not to contain eleven pages, and not to be written on pages numbering from 1 to 11 inclusive, can be considered by the jury to contradict the will itself. The jury must find it was written on the number of pages so stated in the instrument itself, no matter what witnesses may testify on that point. No amount of parol testimony can justify the jury in finding that the statement made in the will itself is not true, or that it was not written on the number of pages that it states it was, both when originally executed and when republished; and if the instrument now propounded for probate is not written on pages numbered from 1 to 11 inclusive, no parol testimony to the contrary can justify the jury in finding this to be the entire instrument originally made, nor the entire instrument as republished by the testator in making the codicil, and if any page of the writing which constituted the will of Alfred Shorter is gone, or is not found in the instrument propounded for probate, and it does not appear what the missing page contained, the other pages so offered cannot be probated without the missing page. If you find these facts to exist, you must find the document propounded is not the last will and testament of Alfred Shorter, and not entitled to probate; and this would be so, whether there was any undue influence or not."

(18.) Because the court erred in refusing to give by itself, as requested in writing by the counsel for caveators, the following charge; and also erred in adding thereto and coupling therewith the words which he did add: "If the propounders of this will have produced in court a book as the book referred to in the will, which is certified to on the book itself, by the testator, as the book so referred to in the will, then the jury would not be justified in finding that some other book, not so certified by the testator, is the book so referred to."

The court gave the above requested charge, adding

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thereto the following, to wit: "I give you this last paragraph or request, in connection with the statement, that you may consider any paper, book or sheet of paper which has been produced on the trial and put in evidence, which may aid you in finding out testator's intention as to the disposition of his property, and to aid you in considering the question whether testator made any other wills, and the time when such were made."

(19.) Because the court erred in giving in charge to the jury the following, to-wit: "I charge you that a codicil is merely an addition or appendix to a will. It and the will to which it is attached become parts of one entire will or testament; and if the codicil is itself duly executed and attested as the law requires for wills, its legal execution and attestation applies to and renders effective the whole will as it exists at the time of making the codicil, and including all changes therein or additions thereto, which the testator may have made prior to the execution of the codicil, unless the evidence shows to the contrary. So, if you should find, in your investigation, that the sheets or pages before mentioned, namely, the 6th, 7th and 9th of the instrument propounded as the last will of Alfred Shorter, or any one or more of them, were not in the will when it was originally executed, but were afterwards, and before making the codicil, inserted in the will by the testator, with the intention of thereby making them parts of his will, then the legal execution of the codicil to the will, as thus amended or altered, rendered the whole will, including the additions or alterations, good and valid as a will, unless the language of the codicil, and the whole codicil, taken together with all evidence in the case, show that such was not the intention of the testator, but that his intention was to execute and republish the will as originally made, leaving out the alleged additions before mentioned."

(20.) Because the court erred in its entire charge to the jury as a whole.

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The motion was overruled, and the caveators excepted.

WRIGHT, MEYERHARDT & WRIGHT; FORSYTH & HOSKINSON; R. D. HARVEY & SON; H. R. SHORTER; C. A. THORNWELL; J. M. SMITH, for plaintiffs in error, cited: On admission of parol evidence and declarations of testator, 1 Redf. Wills (2d Ed. 1866), b. p. 473, par. 39, 474, sec. 2, note 2; 5 Pick., 404; 13 *Id.*, 45; 7 Met., 188, 301; 24 Mo., 311; 6 Conn., 270; 3 Met., 423; 1 Jar. Wills (Ed. 1880), 708; 1 Johns. Ch., 281; 4 Wash. C. C., 265; 2 Johns, 31; 1 Vesey, 440; 1 P. Wms., 136; 30 *Ga.*, 167; 12 *Id.*, 156; 31 *Id.*, 200, 371; 45 *Id.*, 247, 538; 47 *Id.*, 455, 470; 8 *Id.*, 41; 14 *Id.*, 374; 50 *Id.*, 191; 62 *Id.*, 253; 257; 35 *Id.*, 151, 156; 8 Am. R., 667; Wigr. Wills (2 Am. Ed.); 11 Jurist, 111; 1 Greenl. Ev., §§398, 564; 1 Mer., 389; 5 B. & Adol., 129, 663; 6 N. Y., 380; 2 Atk., 239; 3 Sim., 24; 3 Ves. Jr., 306; 1 Ves., 230; 2 Ves. & B., 318; 10 Hare, 348; 6 T. R., 252, 354; 2 P. Wms., 157; 2 Vern., 625; 2 Wms., Ex'rs, (2 Am. Ed.), 867; 5 Cowen, 221; Ala. L. Jour., Dec., 1882, 361; 16 Am. Dec., (2 A. K. Marshall), 50; 12 Am. Dec. (11 John.), 201; 1 Greenl. Ev., §290; 1 Story Eq. Jur., §181; 6 Am. Dec., 53; 17 *Ga.*, 558; 26 *Id.*, 582; 15 *Id.*, 196; 36 *Id.*, 479; Abb. Tr. Ev., 129, 133; 1 Redf. Wills, 314-16; Code, §§2476, 2471, 2473, 2475; 64 *Ga.*, 167; 65 *Id.*, 275; 66 *Id.*, 550, 738; 50 *Id.*, 181; 1 T. & C. (N. Y.), 442; 27 *Ga.*, 324; 16 N. Y., 9; 46 *Ga.*, 247; 12 M. & W., 600; 1 *Ga.*, 12-21.

On the missing pages, 1 L. R., Prob. Div., 154; 1 Redf. Wills (1866), b. p. 308; 5 B. Monroe, 58; 4 Bibb, 553; 4 Monroe, 423; 4 Dana., 220; 87 Pa. St., 67; 14 Bush., 434; 11 Wend., 227, 599; 101 Ill., 411; 41 Barb., 385; 40 Conn., 587, 589; 14 Vt., 425; 41 *Id.*, 59; 2 Mills (S. C.), 334; 2 Richardson, 184; 2 Binney, 406; 10 Yerger, 84; 31 Wis., 691; 62 Ind., 61; 1 Green Ch., 221; 3 Pick., 67; 120 Mass., 177; 40 Miss., 83; 8 Metc., 487, 490; Code, §§2400, 2481; 39 *Ga.*, 168; 13 *Id.*, 63; 14 *Id.*, 185, 195; 21 *Id.*, 13; 63

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N. Y., 460; Abb. Tr. Ev., 58 (note); 1 Jar. Wills, 48; 50 *Ga.*, 523; 24 *Id.*, 84; 31 *Id.*, 483.

On the codicil, 12 Mees. & W., 600; 5 Jur. N. S., 252, (S. C. 1 Sw. & Tr., 262); 1 Redf. Wills, 277, 518; 1 Jar. Wills, 267, 304, ; 2 Whart. Ev., 897; Powell Dev., 320, marg. p. 548; 35 *Ga.*, 151; 66 *Id.*, 738; 65 *Id.*, 275, 64 *Id.*, 167; Abbott Tr. Ev., 134, §87.

On unnatural wills and suspicious legacies, 2 Domat. Civil Law, Part 2, Book 3, Title 2; 1 Redf. Wills, 452, sec. 14, 521, 523; 20 *Ga.*, 720-8; 33 Ala., 148; 17 *Id.*, 88.

On continuance, 30 *Ga.*, 816; 39 *Id.*, 186; 27 *Id.*, 411.

Verdict wrong, 24 *Ga.*, 171; 48 *Id.*, 540.

On striking from grand jury, 65 *Ga.*, 678.

On new trial generally, 44 *Ga.*, 638, 643; 59 *Id.*, 722; 57 *Id.*, 607.

ALEXANDER & WRIGHT; UNDERWOOD & ROWELL; GEORGE HILLYER; J. H. REECE; C. N. FEATHERSTON; J. F. HILLYER; L. E. BLECKLEY, for defendants, cited: On admission of parol evidence, ambiguities and declarations of testator, 53 *Ga.*, 678; 1 Greenl. Ev., §564 and notes; 3 Burrow 1775; 1 Wms. Ex'rs, 130 (note); 63 *Ga.*, 146; 10 Burr., 100; 3 Humph., 284; 130 Mass., 96; 16 Gray, 99; 4 Strobart, 190; 6 Bing., 310; 2 Brod. & Bing., 314; L. R., 1 P. & D., 8, 201; 12 M. & W., 600; 1 Wms. Ex'rs, (6 Ed.), t. p. 252; 9 Jac. Fish. Dig., 13660, 13663, 13664, 13786, 13741; Wigr. Wills, 252; 1 L. R. P., 546; L. R., 3 P. & D., 84 (S. C. 6 Moak R., 365); 1 Pow. Dev., 64; 18 C. L. J. No. 4, p. 68, note and cit.; 3 Phillim., 445, 434 and notes, 452-5; 3 Addams, 226, 232, 506, 509; 2 *Id.*, 286-9; 1 Haggard, 674, 289; 2 Phillim., 290, 416; 3 Curteis, 531-4; 3 B. Monroe, 390 *et seq.*; 1 Wms. Ex'rs (5 Ed.), 91 and notes, 312 *et seq.*; 1 Jar. Wills (4 Ed.), 358-9; 32 *Ga.*, 156; 1 Mason, 9; 1 Phillim., 130; 4 Bligh, 359; 1 Bouv. L. Dic., 97; 25 *Ga.*, 142; 14 *Id.*, 375; Code, §§2457, 3801, 2854; Jacob's

Dict., §§443, 445; 1 Freem., §292; 5 Rep., 68; Spen. Abr., part 10, voc. Testament; Bridg., 105; Code, §§2757; 2 Vern., 98, 225, 625; Cowp., 53; Jacob's Dict. 2, §461; 2 Bac. Abr., 606, 607; 2 Vern., 593; 1 Johns., 360; 1 Br. Ch., 477; 3 Bac. Abr., 607; 3 Ves., Jr., 306, 308; 2 Vern., 593; 2 Br. Ch., 165; 3 Ves. Jr., 516; 5 *Id.*, 79; 6 *Id.*, 321; 7 *Id.*, 508; Leon., 18, *vide tit.* Devise, 1 Monr., 72; 3 Bac. Abr., 608, 609, 610-12; Mau. & Sel., 299; 1 Barn. & A., 247; 6 Taunt., 14; 5 Barn. & A., 847; 6 T. R., 671; 2 P. Wms., 141; Dev. Eq. R., 286; Vern., 473; 1 Ves. Jr., 258; 6 *Id.*, 398; 2 *Id.*, 465, 644; 4 *Id.*, 734; 6 *Id.*, 324; 7 *Id.*, 503-18; 10 *Id.*, 77; 2 Ves., 95; 2 Bro. C., 526, 1 Vern., 30; 2 P. Wms., 153; 5 Ves., 359; 3 Phillim., 461 130 Mass., 96; 2 Addams, 286; 1 Haggard, 674; 3 Eng. Ecc. Rep., 289; 1 Jar. Wills, 354-9; 1 Wms. Ex'rs, 312, 313, 91, notes; 2 Phillim., 290; 3 Add. (2 Eng. Ecc. Rep.), 232, 209; 4 Ves. Jr., 186; 2 Phillim., 48; 3 Addams, 626; 2 Haggard, 537; 3 Curteis, 636; 9 Jac. Fish. Dig., 13659, 13661-6, 13705-4; 68 *Ga.*, 830; 1 Greenl., §§297, 300; 25 *Ga.*, 142; Code, §§2248, 2472; 14 *Ga.*, 378; 23 *Id.*, 262; 31 *Id.*, 201; Code, §3804; 46 *Ga.*, 232-5; 63 *Id.*, 132; 16 *Id.*, 521; 8 Bing., 244; 3 Ves., 306; 14 *Ga.*, 377; 57 *Id.*, 181; 49 *Id.*, 102; 3 *Id.*, 557; 28 *Id.*, 262; 24 *Id.*, 338; 25 *Id.*, 141; 32 *Id.*, 348; 38 *Id.*, 648; 1 Jar. Wills, 362; 1 P. W., 425; Benj. Sales, 155-6 and cit.; 7 Gill & John, 311; 5 Ind., 389; 1 Jar. Wills, 127, note; 3 Bacon, 609; 5 Barn. & A., 847; 130 Mass., 355; 43 N. Y. L., 591; 60 How. P. (N. Y.), 422; 7 Ill. App., 24; 32 O., 313; 15 Wis., 144; 45 *Id.*, 211; 57 Ala., 440; 8 Oregon, 188; 42 Md., 410; 59 N. Y., 434; Code, §2754; 57 *Ga.*, 36; 61 *Id.*, 364; 48 *Id.*, 504; 43 *Id.*, 160; 13 Ves., 310; 36 *Ga.*, 70; 32 *Id.*, 160-3; 1 Haws., 247, 268-9; 38 *Ga.*, 562; Code, §§2474, 2475; 1 Addams, 175, 411; 1 Jar. Wills, 374, 337-9, 340-1, 116, 123, note; 16 Gray, 99; Code, §2478; 63 *Ga.*, 146; 3 Hagg., 570; 4 *Id.*, 410; 1 Jar. Wills, 89; 12 O. St., 381; 21 Md., 264; 2 Dall., 70; 2 Am. Prob. R., 27.

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On the missing or revoked sheets, Code, §§2475, 2471; 11 C. B., N. S. (103 E. C. L.), 341; 1 Wms. Ex'rs, 134 and notes; 1 L. R., P. D., 154; 6 Mo., 177 (S. C. 34 Am. Dec., 134); 4 Mo., 211, 608; 1 Jar. Wills, 248, note y, 290, note; 3 Redf. Wills, note 7; 5 B. Monroe, 58; 1 Redf. Wills, 349, note; Jac. Fish. Dig., 13709, 13730, 13736; 1 Jar. Wills, 302, 291 and notes; 1 Wms. Ex'rs 101, 179, 180 and notes; 1 Pow. Dev. 518, 520 and notes; 1 Wms. Ex'rs. (6 Ed.), 201-3, 134 notes; 1 Jar. Wills, 338, 339 and notes; 1 Cowp., 187; 3 Mod. R., 203; Hard., 374 (S. C. Shaw, 146); 10 Bac. Abr., 547; 3 Barb. Ch., 165; 39 Am. Dec., 263; 2 Cowp., 812; 3 B. & P., 16; 4 East., 418; 1 P. Wms., 343; 2 Brad. & Bing., 314; 4 Burrow, 280-2; Reese's Man., 105, 106; 18 L. T. N. S., 301; 16 W. R., 673; 1 Rob. (Va.), 346 (S. C. 39 Am. Dec., 263); 4 East, 418; 8 Cow., 56; 130 Mass., 95.

On the codicil, 1 Cowp., 132, 153; 35 *Ga.*, 151; 1 Add., 17; 1 Hill, 591; 3 B. Monroe, 390; 39 Am. R., 753; 1 Am. Prob. Prac. R., 516, 96; 2 S. & T., 474; 31 L. J. P., 190; 10 W. R., 848; 6 L. T., N. S., 474; 9 Jac. Fish. Dig., 13660, 13700, 13663; 1 Wms. Ex'rs, 212, 218, 224, 252; 1 Jar., Wills, 114 *et seq.*, 121, 189-91; 1 Redf. Wills, 368, (3), (4), 371, (6); 2 Notes of Cases, 406, 183, 79; L. R., 3 P. & D., 26; 5 Moak's Eng. R., 521; 12 Jur., 465; 1 Sw. & Tr., 494; 31 L. J. Prob., 197; L. R., 2 P. & D., 256; 2 Robert, 622; 5 Notes of Cases, 203; 6 *Id.*, 183; 29 L. J. P. M. & A., 155; 6 Jur., N. S., 1165; 3 B. Monroe, 390; 4 Ves., 610; 5 Sim., 274; 4 DeG. & S., 475; 3 Beav., 460; L. R., 16 Eq., 19; 9 Ch. Dec., 231 and cit.; Enc. Relig. Knowl., 319, 320; L. R., 1 P. & D., 201, 258; 14 Pick., 534; 12 M. & W., 600; 77 N. Y., 369; 1 Add., 41; Code, §2478; 1 Pow. Dev., 94; 1 Red. Wills, 203, 209; 1 Jar. Wills, 217; 3 Burr., 1775; 1 Wms. Ex'rs, 130, note (x).

On pleadings and practice as to missing sheets, 14 *Ga.*, 362; 17 *Id.*, 417; 18 *Id.*, 473; 1 Brown's Ad. & Civ. L., 453, 454; 4 Co., 29 A.; 7 *Id.*, 42 B.; Roll. Abr. S. 30; Code, §§4114, 4116, 3452, 3332; 47 *Ga.*, 205; 45 *Id.*, 144.

On fraud and undue influence, Nontes Prob. Trac., §§185, 92.

On striking from grand jury, Code, §§2925, 3630, 3925, 3926; 65 *Ga.*, 678; 68 *Id.*, 434; 64 *Id.*, 562.

On intention of testator, 1 Cowp., 52; 1 P. Wms., 345.

On continuance, 54 *Ga.*, 660-2; 61 *Id.*, 481; 59 *Id.*, 83, 660, 612, 189; 46 *Id.*, 273-6, 205; Code, §§3630, 3531, 3522, 3529, 3525; 1 Kelly, 213-15, 574; 45 *Ga.*, 2-3; 10 *Id.*, 85, 92, 403; 39 *Id.*, 591, 359; 41 *Id.*, 102; 53 *Id.*, 152; 33 *Id.*, 372; 14 *Id.*, 6, 22, 24; 18 *Id.*, 389; 5 *Id.*, 58, 52; 49 *Id.*, 215; 26 *Id.*, 500, 275; 47 *Id.*, 601; 38 *Id.*, 401, 491, 506; 64 *Id.*, 374, 404, 416; 24 *Id.*, 297; 21 *Id.*, 11, 301-6, 492; 37 *Id.*, 101, 678-80; 42 *Id.*, 404; 15 *Id.*, 535; 68 *Id.*, 287; 55 *Id.*, 21, 47, 203; 51 *Id.*, 152; 60 *Id.*, 157, 237, 634; 58 *Id.*, 208; 57 *Id.*, 241, 351, 236, 435; 30 *Id.*, 829.

On general exceptions to charge, 67 *Ga.*, 153, 707; 68 *Id.*, 296, 836.

On new trial, generally, 1 Peters, 70; 37 *Ga.*, 101; 6 Cow. (N. Y.), 118; 2 Bing., 483, 2 T. R., 4; 24 Ill., 444; 58 *Ga.*, 485; 59 *Id.*, 738; 61 *Id.*, 448; 30 *Id.*, 958; 31 *Id.*, 671, 492; 37 *Id.*, 351, 236; 14 *Id.*, 43; 39 *Id.*, 360; 30 *Id.*, 220; 39 N. Y. C. L., 113; 45 *Ga.*, 94; Charlton, 281.

On alteration, 53 *Ga.*, 678; 45 *Id.*, 533; 17 *Id.*, 558; 26 *Id.*, 582; 15 *Id.*, 196; 31 *Id.*, 371; 36 *Id.*, 479; 1 Greenl. Ev., §564 and notes; 1 Jar. Wills, 205, 304; 1 Wms. Ex'rs, (6 Ed.), 168, 169; 1 L. R., 3 P. & D., 84 (S. C. 6 Moak, 365); 3 Veas. & Bea., 122.

Falsa demonstratio non nocet, Broom Max., 637 *et seq.*; Branch Principia, 112; 22 *Ga.*, 203; 62 *Id.*, 73; 17 *Id.*, 187; 58 *Id.*, 55; 59 *Id.*, 124; 56 *Id.*, 439; 19 *Id.*, 279; 14 *Id.*, 252; 2 Brod. & Bing., 314; 1 Jar. Wills, 205; 12 M. & W., 712; 20 *Ga.*, 689; 56 *Id.*, 643; Jac. Fish. Dig., 13664, 13660, 13786, 13741; 1 Mer., 384; 44 Am. R., 158, (S. C.; 76 Va., 149); 2 D. M. & G., 299; 6 Mad., 350; 1 Sim., 173; 41 Am. R., 493, S. C. 37 O. St., 126); 1 Jar. Wills, 760,

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761, note (r); 76 Pa. St., 197; 2 L. R., P. D., 111; 2 Jar. Wills, 751-5; 14 M. & W., 399.

Probate and construction, Wig. Wills, 114; 41 *Ga.*, 141, 142, 678; 53 *Id.*, 255; 1 L. R. P., 546.

Hypothetical will. 20 *Ga.*, 786; 93 Pa. St., 316; 15 *Id.*, 28.

JACKSON, Chief Justice.

The propounders exhibited a paper which they alleged was the last will of Alfred Shorter. The caveators, being the next of kin of the deceased, took issue, and alleged that it was not. The jury found on that issue with the propounders; thereupon the caveators made a motion for a new trial, and upon the denial of that motion error is assigned here.

On a careful examination of the whole record—of all the grounds of the motion for a new trial, except on matters of practice—we think that they turn upon a single point, and that is, whether the testimony of Mr. Alexander, the scrivener of the codicil and the confidential legal adviser of Mr. Shorter in regard to its execution and the sufficiency of the original will to which it was a codicil to stand the test of legal investigation, was legally admitted.

If that testimony was admissible, the evidence is sufficient to uphold the verdict of the jury, if they gave it credit; if it was not admissible, and could not be considered by the jury, then the opposite conclusion would probably be reached in respect to a part, if not the whole, of the will.

The original will is numbered from one to eleven, inclusive, on the last page of paper propounded as such. On that page the testator says: "I nominate and appoint David B. Hamilton, Judge George Hillyer and Eben Hillyer to be executors of this, my will, to carry the same into effect according to law, and which will I have written on the above and foregoing pages, numbered from one to

eleven inclusive, and identified by my name on the margin." The last digit of the figure eleven, on a close inspection of it, with the aid of a glass, opens slightly, as if by the spreading of the pen, so as to leave a slight vacant spot in the middle, making quite an elongated cipher towards the lower part of the figure, not perceptible, however, to the naked eye of a man of my age at least, and is really, to all moral certainty, not a cipher but a digit, and the number is not the figure ten, but it is the figure eleven; and so I believe almost all, if not all, the witnesses on that point testify. The top of this page has the figure ten upon it, altered from eleven. On the margin of it, as on the margin of all the other pages of the document or paper, is the signature of Alfred Shorter plainly written. The preceding page has the figure nine plainly on its top, and altered from nothing else; no other figure ever was there. This page nine contains the residuary clause of the will, by which Mrs. Hamilton is made the sole residuary legatee, and on its margin also is plainly written testator's signature.

Page eight has been altered from some other figure, apparently from seven. It contains a forty thousand dollar legacy to the heirs of testator's sister, Mrs. Beeland, two other minor bequests, and a loan to a friend, while running a furnace leased from the testator.

Page seven is quite plainly numbered on the top, and the number is not made over any other, or changed at all from any other. It is the bequest to Shorter Female College.

Page number six is apparently altered from five, which once was marked at the top. It disposes of previous devises to married women in case of their death, giving it to the children, and making husbands trustees without bond, subject, however, to any will Mrs. Brooks may make or may have made; and provides that if either owe him anything at his death, it is to be credited on the legacy, and if he builds on real estate given to any, the improvement



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is to be accounted for at the price he charges in the book where he keeps such accounts, and if he sell such property, the legacy is not to lapse, but the money value is to be paid as entered in the same book.

Page five is unaltered, and states settlements as executor and trustee or guardian with Georgia E. Hillyer, Ellen E. Hillyer, Milton A. Cooley, Alexander T. Harper, Elizabeth H. Wright, Charles M. Harper and Armstead R. Harper, deceased, and that he owes them nothing.

Page number four is clean and unaltered, and contains a bequest to Charles M. Harper of certain real estate, and to Milton A. Cooley of other real estate, with provisions as to their power to sell and encumber the same.

Page number three is also a clear figure, and on that page are bequests to certain Hamiltons and Harpers and Mrs. Wright, and to Alfred S. Hamilton his undivided half interest in a store.

Page number two is also clean, and gives Mary Rhodes a store and railroad stock and bonds.

Page number one is unaltered, too, and gives Martha H. Brooks a store house and lot, railroad stock and bonds and forty-two hundred dollars in money; also Georgia E. Hillyer railroad stock and bonds and ten thousand dollars, and also to Ellen E. Hillyer railroad stock and bonds and sixteen thousand dollars in money.

The codicil, executed twelve months after the will, in July of 1882, the will having been executed the same month in 1881, declares that, "Being still of sound and disposing mind and memory, I, Alfred Shorter, do make the following codicil to the will made by myself on the 18th day of July, 1881, and attested by W. F. Ayer, J. C. McDonald and J. B. Hine. Said will is now ratified, approved and declared to be my last will in all respects, except in so far as the same is changed by this codicil." The codicil is on three pages, numbered twelve, thirteen and fourteen, and recites that, "Milton A. Cooley having died since the execution of said will, I now annul the bequest

made to him, and give Dr. Eben Hillyer, in trust for the widow and children of the said Milton A. Cooley, the store house and lot in the Coosa division of the city of Rome, occupied by Davis & Co., and known as the Crystal Palace, together with three thousand dollars of Rome water works bonds, and three hundred dollars of Rome city bonds, the latter known as twenty year bonds,—the income to be used for the benefit of the family, and the *corpus* to be divided equally between the widow and children, when the youngest of them becomes twenty-one years of age." On the fourth page of the original paper propounded, he had given to Milton A. Cooley, "the store house and lot on Broad street, Coosa division, city of Rome, known as the Crystal Palace, and now occupied by Davis & Co. as a dry goods store, without his having any power to sell, dispose of, etc., until his youngest child arrives at the age of twenty-one years." So that this codicil makes such reference to what he had given to Cooley as to show that when he executed the codicil he had in mind this clause of the will.

Next in the codicil, on the thirteenth page, he adds, "Being satisfied that the Shorter Female College is in present need of additional apparatus, furniture, instruments, etc., and the grounds about the college building need improvement, I give to the trustees of said college an additional five thousand dollars to be used under the direction," etc., thus making reference to the seventh page of the will, wherein he gave the trustees of that college forty thousand dollars' worth of bonds, with direction "that the *corpus* of said property, as above mentioned, be regarded as sacred, and forever set apart as a permanent endowment of the said Shorter Female College," and the income to be used in employing teachers, reducing tuition, assisting poor worthy students, keeping the property in repair, or in such other way as the trustees thought best to the interest of the college and education.

On the same 13th page of the codicil, he adds, "In addi-

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tion to the specific legacies mentioned in my said will, I now also give to Mrs. Sallie Ansley, living near Social Circle, and who is the daughter of my half sister, the sum of five thousand dollars to her own use, and also the additional one thousand dollars to be expended in the education of her daughter, Sallie," etc., thus recognizing that he had made specific legacies in the will, and implying thereby a residuary legatee.

Then he adds, "I now repeat what has been stated in the body of my said will, that in all cases where legacies or bequests have been made, the same are to be charged with all sums of money or property which I may turn over to the beneficiaries respectively during my lifetime. The book referred to in my will, in which these various charges are made, will indicate the exact status of each when my will goes into effect," thus making reference to and identifying page 6, whereon this provision and allusion to the book of charges are seen in the will.

The original paper propounded as the will is holographic, written every line and word and figure by the testator, with every page identified by his signature on the margin, where figures on the tops of pages are altered, the alteration is plain, without any effort to hide what was done. The codicil is written by Mr. Alexander, and identified by the signature on the margin of each page; but the pages run into each other in the codicil, a paragraph, or even a sentence, being partly on one and partly on another page, and not, in this respect, like the will, where all is concluded appropriate to a page on each page, and no broken paragraphs extend from one to the other page.

1, 2, 3, 4. I have been thus particular in reciting these facts to see whether these papers show such ambiguity as to let in parol evidence to explain it. It must be remarked that about the codicil there is no dispute. That those three pages were written at the request of the testator, read over to him and approved by him, admits of no controversy. If deceased had mind enough to make a will, if not under

undue influence, the codicil being executed in the presence of three witnesses, is a testamentary paper executed by the testator. Now, that paper itself recognizes the will, in so far as it recognizes parts of it. It refers unmistakably to things in the will. It refers to the Cooley legacy; to his death after the execution of the will, and annuls the legacy to him of a certain store-house, and gives that store-house to his brother-in-law in trust for the wife and children of deceased. It refers unmistakably to a general provision in regard to the credit of any advancements or buildings erected on property devised to be placed on the legacies or bequests given each legatee, and repeats what was said in regard to it in substance, and refers to the book as referred to in the will, where the charges of advancements, etc., would be found. It refers to the legacy to the Shorter College, in that it recognizes its immediate need of cash, and thus recognizes the provision in the will which tied up the *corpus*, and directed the expenditure of the income in other ways. It recognizes a residuary legatee, in that the codicil, "in addition to the specific legacies mentioned in his (my) said will," gave another specific legacy of five thousand dollars, and one thousand dollars to another relative. It refers to the will by its precise date, and by the witnesses who attested it; and in all these ways it, the codicil, tends towards identifying the paper offered to be set up as the will to which this codicil was made. Moreover, it is attached to the paper on which the will is written with brackets, and in this condition it is found in the possession of the testator at his death. These facts, we repeat, tend with force to show that the paper thus referred to in the codicil, and fastened to it, is the paper to which the testator had reference, and which he ratified, approved and declared to be his last will, and is the paper which was propounded as the will, and which the jury found to be his will. But the words, "in all respects, except in so far as the same is changed by this codicil," are relied upon to show that it is

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not the paper referred to in the codicil, because the codicil itself begins its paging with No. 12, thus recognizing that will as having eleven pages, and when the will is inspected on its face, the testator declares it does have eleven pages, and says that each page has his signature on its margin, while, in fact, there are only ten pages of that paper, and the last is changed from eleven to ten on the top-paging.

The question thus arises, do not these two papers, thus propounded together, present on their faces great ambiguity? Construed together, do they not? Construing the will part, or rather, considering it by itself, is there not ambiguity, uncertainty, doubtfulness about it? The numbers of some pages untouched as originally written, of others evidently and plainly, not at all disguisedly, altered. The largest bequest being to itself on page No. 9, whose number was not touched, but stands precisely as testator put it there, and being the residuary clause, thus naturally coming before, immediately before, the executory clause, and being every word of it in testator's handwriting, and having his own sign-manual on the margin, by itself, looks all right and genuine; and so do all the other important legacies. All appear clear and pure; and the apparent alteration of top page 11 to 10, and the statement of the executor's clause, "I appoint . . . to be executors of this my will, . . . and which will I have written on the above and foregoing pages, numbered from 1 to 11 inclusive, and identified by my name on the margin," alone throws the ambiguity, the doubt, the uncertainty about either of the preceding legacies. Thus, on the face of this will appears this ambiguity; and thus, when the codicil ratifies and republishes it, referring to the date, the witnesses, several bequests and provisions in it, and identifies it to some extent as the will, yet it still leaves the question, is it the whole will, still uncertain and ambiguous. Parts of it might be set up and admitted to probate on the two papers alone; the clear proof of the

codicil and all it contained, and the reference therein to the contents of the will, and the republication of it thereby, coupled with the very remote possibility that the missing page could have altered the validity and effect of parts of the original will, would admit to probate some, at least, of the bequests, but the ambiguity would remain to affect other parts of the will, and hence the question of the admissibility of the testimony of Mr. Alexander becomes important, if not vital,—if not to every part, yet to the will as a whole.

The will itself thus shows ambiguity, eleven being altered to ten on the last page, and the figures from one to eleven remaining unaltered in the body of the last page; but the codicil shows more clearly this ambiguity of the figures. in numbering its pages twelve, thirteen and fourteen. So that the face of the whole paper propounded makes an ambiguity needing explanation.

If Alexander's testimony be in and be credited, which is for the jury, then this trouble is explained, and no reasonable doubt can remain that the paper fastened to the codicil, with its ten pages, is in its entirety the will and the whole will of Alfred Shorter.

Outside of our own Code, what is the law touching the admissibility of parol evidence in case of such ambiguity as, in our judgment, appears on the face of these papers?

In 1 Williams on Executors, 6 Am. Ed., top p. 388, bottom p. 344, it is said: "But it must not be supposed that, by the ecclesiastical law, two witnesses were required to each particular fact, nor to every part of a transaction; for it often happened that to the contents of a will or to instructions there was only one witness, the confidential solicitor or other drawer; but there were and must have been adminicular circumstances to the transaction, such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions,—some extrinsic circum-

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stances, in short, showing that a testamentary act was in progress, and tending to corroborate the act itself." Citing 4 Haggard, 314; 1 Roberts., 173; 3 Curt., 125; 4 Notes of Cases, 147; Dea. & Sw., 187; 52 N. Y., 517, in note Z. And in the next paragraph on the same, and the succeeding page, it is added: "In Moore *vs.* Paine, the testatrix was entirely blind; there were three subscribing witnesses to the will, but only one of them (*viz.*, the writer, who was of entire credit and wholly unconcerned as to the event of the suit) could account for the instructions, for the reading of the will to the testatrix and her approbation of it, and for the identity of the paper; the other two only deposing to the publication of it by her as her will, but they did not hear it read to her, nor did they know the contents of it. The capacity of the testatrix was fully proved, and that she had made a former will, which differed from this chiefly in the *quantum* of the legacies, which were smaller in that than in this. And Sir George Lee was clearly of opinion that this will was sufficiently proved; and the learned judge observed that the proof of wills with us is by the *jus gentium*, and by that law one witness is sufficient. There should be, indeed, some adminicular proof to corroborate the witness, which, in the present case, arose from the conformity of the former to the present will, and from a declaration which it appeared in evidence the deceased had made, that she believed some of her relations did not approve of her will, which was some sort of recognition of this will. This cause was appealed to the delegates, where the sentence was confirmed." 2 Cas. temp. Lee 595.

Do not the remarks of this learned commentator on the law in respect to the probate of wills, and to the effect that all the attesting witnesses necessary to the execution of the paper need not be called to each part of the transaction, to each particular fact therein, but that the confidential solicitor who draws the paper is sufficient to prove its contents, and to identify it as the thing which was made

his will by the deceased, apply to the case here? And does not the principle ruled in the case of *Moore vs. Paine* cover the point here? There the testatrix was blind, yet her will was set up on the testimony of the writer, who alone identified it as having been known to her, with nothing to aid his evidence but the conformity of the will on probate to a former will in some respects, and her remark that her relations did not like her will, "which was some sort of recognition of this will."

In the case before us, Mr. Alexander, in like manner entitled to full credit, and wholly disinterested, too, in the will, fully identifies it, just as it now stands, as the will to which testator referred in the codicil, and which he had entrusted to him to examine and see that it was all in conformity to law, at the same time that he gave him instructions to draw the codicil, which he did draw, and as the very paper which testator republished by the codicil as his will. He, Alexander, saw the mistake in paging, and mentioned it to deceased, who observed simply that it was a mistake; he read it to deceased by pages as it now stands, and it is the paper, the whole paper, which was bracketed with the codicil as one will, and was found to be the will of Alfred Shorter by the jury. The adminicular proof of identity is stronger than in *Moore vs. Paine*. References are made to the will in the codicil which unmistakably point to parts of it, and, with the evidence of Mr. Alexander, make an irresistible lodgment in a fair mind, that these papers, thus tied together, and together constituting the disposition which propounders allege the deceased made of his property, do in truth together express the wishes of deceased in respect to that property.

Suppose Alexander had been the scrivener who wrote the original will, and had attested it with two other witnesses, and had in like manner read it over to the deceased, and its identity had been questioned by reason of ambiguity on the face of the will, arising from the fact that the paging on the top of the pages did not correspond in

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number with the summary of them by the testator in the executory clause, can it be doubted that he could be called simply to examine the paper and explain such an ambiguity and to identify the paper, though wrongly paged and with three pages altered, as the very paper he drew for deceased, and that which he and the other two attested ; and when the jury believed what he swore and found for the will, his testimony being supported by adminicular proof, would not the proof uphold that finding as legal and sustained by sufficient proof of identity to remove the ambiguity

Well, the actual case before us is one where the deceased himself wrote a paper as his will ; he gave it to Mr. Alexander, as his lawyer and confidential adviser, to prepare a codicil to it, and to inspect it and see that the paper was all right in law ; he took it, examined it, found it right except this ambiguity of figures, read it over with that paging, as it is, to the deceased, word for word, and called his attention to the paging. Why may he not in like manner explain it, when by the codicil this paper is sought to be proclaimed and ratified as a will, as well as he could have done it had he prepared and witnessed the original paper ? He was a witness to the republication of something by being a witness to the thing which republished that something. By witnessing the codicil which republished the will, he became a witness to that which proclaimed a certain paper to be the will. If he read over that paper to the testator, and knew its identity with the thing republished, why should he not identify it ? Suppose that the spread of eleven into an elongated cipher thus, 10, so as to make it read from one to ten, had been made by direction of deceased, and been altered from eleven to ten by him, could he not have explained how that was done and why ? And so of the other altered numbers, could he not have told his client, the testator, that these alterations ought to be made, and make them by his direction, and thus explain the ambiguity and identify the

will? Assuredly. If so, why could he not make an explanation, less satisfactory perhaps,—its sufficiency to be left to the jury on the trial of identity, and to the court in reviewing the verdict, and that explanation to be weighed with such adminicular proof as was produced on the one hand and the appearance of the paper on the other, and thus the scales to weigh them, the law, to be applied and the sufficiency of the proof to be determined? We are really troubled to see why he may not.

In addition to the references of the codicil to the will as assisting links in the chain of identification, it may be added that loose sheets of what were probably parts of former wills, one made in 1878, as the proof shows, and attested by those who witnessed the paper now offered for probate in 1881, have bequests similar to those in this will, and marked cancelled; and it may be that the pages, with altered numbers, were taken from the former will and placed in this at a different place, and thus requiring a change of the figure. There are also circumstances, however slight, which strengthen the idea that the pages offered for probate compose the will of deceased. Taking the explicit and emphatic statement of Mr. Alexander, that there were but these same ten pages to the will which Mr. Shorter handed to him to examine, and adding to it the fact that he read it over to him carefully, page by page, to see what alterations Mr. Shorter wished made by the codicil, and then took it home, at Shorter's request, to see that it should be all right and the codicil should be prepared so as to fit in with it; and adding again the references made in the codicil to clauses of the will, which seem unmistakable, and references to the date and witnesses thereof, and the fact that it was then attached to the codicil and enclosed in the envelope addressed to the ordinary, and the same package was opened by Alexander and again identified as being the identical thing he sealed up and so addressed to the ordinary; and adding the fact that all the paper offered, every page, is in the handwriting of the deceased, and one:

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bequest, which was changed from another figure to forty thousand dollars, is also in his handwriting—it having been first carefully obliterated and then carefully re-written; and also the fact that loose sheets of what purported to be a former will, also in his handwriting, tend to the same point, in that they indicate, in the main, the same legatees and legacies of the same approximate sums of money or pieces of property, altered, as might be well supposed would be the case, when another will is made, as was the case here, and yet the female college which bore his name and which he controlled in life and loved till death, a favorite legatee all the time, in all loose sheets which are found in his handwriting, as in the paper propounded and the codicil thereto, and everywhere second only in his liberality, as in his affection, to the infant niece and name-sake of his dead wife, whom they raised from that infancy to her marriage, in their home, and whom, with her children and husband, he recalled to that home, vacated by that wife forever, to supply as far as possible a place never again to be perfectly filled, and yet so far filled that hers was the hand that smoothed his last pillow, and hers the breast on which he breathed his last sigh,—add all these facts to that clear testimony of this confidential legal adviser, and it seems to us they make a strong case to solve the ambiguity caused by the difference of count in the top paging numbers and the summary in the body of the executory clause or page of the paper, all in figures and not written full in letters, in favor of the fact being that the top numbers speak what truth demands, that eleven was changed to ten to show that truth, and as the deceased said when he summed up and counted, he must have made a mistake, and by inadvertence or the idea that it was a mere trifling mistake, he had neglected to correct it before, as he and Alexander, his counsel, both by their failure to correct it afterwards, showed that it was regarded as a mere trifle, and they make a strong case also to convince the mind that

the paper propounded is the will, the entire will, with the codicil, of Alfred Shorter.

So the same learned commentator (Williams), on top page 404, bottom page 853 of the same volume says: "In a court of construction, when the *factum* of the instrument has been previously established in the court of probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the court of probate the inquiry is not so limited, for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together." And there, 2 Add., 243; 2 Phillim., 426; 3 Sw. & Tr., 586, and other cases in note h, are cited. It is added: "They must, however, be circumstances existing at the time the will is made," citing 1 Robert, 661, 668; and 6 Notes of Cases, per Sir H. J. Fust in note i. We apprehend that the circumstances existing when the codicil is made, which republishes the will, come clearly within this limitation upon the rule here made, especially when the scrivener of the codicil is the lawyer and confidential adviser of the testator, and was employed by him to examine closely the will, and see that it complied with the law.

Also, in the same volume, the fact that the codicil and will are attached, it is said, is significant on the matter of republication of the latter by the former. On top pages 251-252, bottom pages 212-213, the author says: "A codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it. . . . But, although the effect of a codicil, as to republication, is by no means dependent on its being annexed to the will, yet if there are several wills of different dates, and there be a question to which of them the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that (it) was intended as a codicil to the will to

which it is annexed, and to no other," citing 1 Add., 41; 1 Vesey, Jr., 490.

It is true that, in the case now before us, no other completed paper contests with that propounded the fact of being the entire will of the decedent; but the contest is that one page is missing from the paper propounded, and it takes that page to make this paper complete. Yet if the pages, as they now stand, numbered as they are, but ten pages as now offered for probate, be annexed to the codicil, is not that circumstance equally powerful that the codicil was intended to be a codicil to those ten pages so annexed, as the complete will of Alfred Shorter?

The learned commentator, moreover, goes further and adds: "A codicil referring inaccurately to a will may republish it." And as authority for this *dictum*, he refers to the case of Janson *vs.* Janson, cited by Sir John Nicholl in Rogers *vs.* Pittis, 1 Add., 38, where the deceased had "executed two wills, the one dated the 21st of July, 1792, and the other dated the 18th July, 1796," and "made a codicil in 1820, referring in terms to his will, not of the twenty-first, but of the first of July, 1792; and it was held that as the other circumstances of the case showed that the codicil referred to the will of 1792, and not to that of 1796, the inaccuracy was immaterial, and the will of 1792 was therefore republished." The principle thus ruled is, that "other circumstances of the case"—that is, extrinsic circumstances, which must have been shown by parol evidence—would operate to annul the last will, made in 1796, and to set up in lieu of it one made in 1792, notwithstanding that the date of the latter, as referred to in the codicil, was erroneous. The question was one of identity of the will to which the codicil referred, and these circumstances were admitted in evidence to show that identity, though the face of the codicil contradicted it. So here the question is the identity of these ten pages with that will to which this codicil refers, and all "the other circumstances of this case" may be let in to show the identity of the

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paper propounded with that referred to, and republished by this codicil, though it may contradict one enumeration of paging in that paper. The only difference is, that in this case the inaccuracy is in the will, while in that cited by Sir John Nicholl it was in the codicil; but, inasmuch as both will and codicil were under consideration at the same time by the deceased and his confidential adviser, it is not easy to see a rational distinction between the two cases, so far as the admissibility of the circumstances of each case is concerned on the point of identifying the paper referred to in the codicil. Besides, this ambiguity of figuring is carried from the will into the codicil by the paging therein too, which paging is numbered 12, 13, 14, as if 11 were the number of pages in the will. So that here the inaccuracy is in the codicil too, as well as the will, thus making this case closer akin to that cited and approved by that eminent judge, and by this no less learned and eminent commentator, so recognized repeatedly by the entire English bench.

But, outside of these principles deduced by Williams from the authorities examined and cited by him, the court of appeals in England, on questions of this sort, in the case of Sugden and others *vs.* Lord St. Leonards and others, in Vol. I., Probate Division of the Law Reports, p. 154, has adjudicated all these questions in respect to the admissibility and sufficiency of proof of contents, even of a lost will, by a single witness. The principles there ruled are, that "the contents of a lost will, like those of any other lost document, may be proved by secondary evidence; that declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; that the contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached; and that when the contents of a lost will are not completely

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proved, probate will be granted to the extent to which they are proved."

It is true, that probate was there asked of a lost will, and the contents were proved by this evidence as secondary, but, if to prove that the contents were known to the testator required three witnesses, though the will were in writing and not lost, be the law or rule of evidence, much more ought it to require three witnesses to prove those contents if the writing be lost. So we take it that this ruling means that a single witness may show that the contents, and all the contents of any will, whether in existence or lost, were known to the testator, and that in a codicil he referred it and republished it. At all events, that any ambiguity or doubt about those contents arising on its face may be explained by the one witness, who was testator's confidential adviser, so as to identify the will.

It will be observed that the ruling in this great case goes to the full extent not only of admitting all that transpires between the testator and his confidential adviser in the examination and execution of papers as his will or codicil, or both, at the time of execution, but of admitting the statements of testator both before and after their execution. Chief Justice Cockburn in delivering the opinion of the court, says: "He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied upon, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case. It is upon this principle, I presume, that the declarations of a deceased testator have, in more instances than one, been admitted as evidence. Thus, they

have been admitted, as in *Doe vs. Palmer*, 16 Q. B., 747, to negative the presumption arising from interlineations appearing on the face of a will, that such interlineations have been made subsequently to the execution of the will," etc.

And then the Chief Justice adds, in the same case and immediately thereafter: "The question before us is, whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of a will known to have existed, but at his death is no longer forthcoming. That morally such statements and declaration are entitled, where no doubt exists of their sincerity, to the greatest weight, cannot be denied; and I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will." The other purpose, besides the explanation of interlineations referred to by the Chief Justice, for which the statements had been held admissible, is such as "when I am dead you will find my will in such a place," or, "I have left my estate of Blackacre to my son John;" or, "I have left 5,000£ to my daughter Mary;" and the conclusion which the high appellate court in England on matters of probate reached is, that the whole contents of a lost will might be proved in the same way by similar statements, on the question of its *factum* and the identity of its contents when made.

In *Doe vs. Palmer*, referred to in that opinion, the admissibility of such evidence was confined to declarations made before the execution of the will, but the rule was extended in the case of Lord St. Leonards' will to statements after its execution. It is to be noticed, too, that the will in that case—*Doe vs. Palmer*—was not lost; but the question was upon interlineations and erasures in the written will produced. Were these alterations made before the will was executed, was the question; and the court, allowing that the presumption is that they were

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made afterwards, admitted the statements of the testator to rebut that presumption. So in the case now before us the question is, was the alteration of the figures 11 to 10 made before or after the execution of the will, or of the codicil which republished the will, and was the alteration in the top numbers of other pages so made, and was thus the true number of pages ten, or was it eleven, at the time this codicil was executed, notwithstanding the figure 11 remained unaltered in the body of the page; and was the statement of the testator to Mr. Alexander at the very time the codicil was read to him, to the effect that he must have made a mistake in that enumeration, and ten was the true enumeration, and the fact that he, Alexander, the Saturday before, read the ten pages, every word of them, and them only, to testator, was this evidence also admissible to show the identity of these ten pages with the whole will testator had executed the year before, and which he republished when he executed the codicil? If interlineations and erasures, going to prove material bequests in a will may be thus explained, why not an ambiguity or doubt touching the identity of the paper as the whole will, arising not out of ambiguous words or sentences, or other material writing, but the number of pages in figures summed up, ten altered from eleven in one place, and an unaltered eleven in another, be likewise so explained? The human mind is ingenious to find out many inventions, but it is not easy for a plain, open, fair mind, seeking truth, to reject the statements in the one case and admit them in the other.

The case of *Sugden vs. Lord St. Leonards* was decided by the entire bench, composed of the Lord Chancellor, Lord Chief Justice, Master of the Rolls, and six other judges, making the court of appeal in probate cases in England in the year 1876; and in 1880, it was followed by the case of *Gould vs. Lakes*, 6 Vol. Probate Division, p. 1. Where it was ruled that, "Statements of a testatrix, whether made before or after the execution of the will,

are admissible to show what papers constitute the will." And this is not the case of a lost will, but of whether a certain sheet was part of a will, very similar to the case at bar. In *Gould vs. Lakes*, a sheet was alleged as not being part of the will; in this case at bar, a page is alleged to be missing. In that case, on the death of deceased, her will was found in her writing desk in an envelope, which had been apparently thrice opened and resealed. With the exception of the attestation clause, it was all in her own handwriting, and contained in two sheets of old fashioned note paper, one within the other, and stitched together bookwise. Upon the first page of the outer sheet were the words :

"I appoint my two nephews, Robert John Gould and Robert Gould Lakes, to be my joint executors to carry my will into effect. I appoint my nephew, Robert John Gould, to be my executor and sole residuary legatee, Martha Rashleigh, and placed with my will the 1st day of August, 1872. Stanley Lodge, Exmouth."

The second side was blank, and the next four pages after the blank page, viz., the whole of the inner sheets were paged 1, 2, 3, 4. On 1, 2 and 3 were legacies. Page 4 was as follows :

"I bequeath to my step-son, Sir Colman Rashleigh, Baronet of Prideaux, Luxulian, Cornwall, the sum of 5000£. I declare this to be my last will and testament, and in witness hereof, I hereunto set my hand and seal this 1st day of August in the year of our Lord, 1872.

(Signed)

MARTHA RASHLEIGH.

Signed, sealed and declared to be her last will and testament by the said Martha Rashleigh, the testatrix, in our presence, who, in her presence, and in the presence of each other at the same time, subscribe our names as witnesses."

And then signed by the witnesses. "The next page of the document, *i. e.*, the inner side of the outer sheet, was a blank, and the outer side of all contained the endorsement : 'The will of Martha Rashleigh, August 1st, 1872.' Neither of the attesting witnesses were able to say whether the will was contained in one or two sheets of paper, or

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to recollect anything, except that it was duly executed in their presence. Mr. Tremayne (one of the witnesses), who had read the will before its execution, and who had filled up the attestation clause at the request of the testatrix, had no recollection whatever of its contents. It appeared, however, that before the execution of the will, the testatrix repeatedly expressed orally and in letters her intention of making her nephew, Robert John Gould, her executor and residuary legatee, and it further appeared from declarations of the testatrix, contained in letters written after the execution of the will, and in declarations repeated by her shortly before her death, that she believed she had given effect to this intention in her will."

So that the point was clearly made whether statements of the testatrix, both before and after the execution of a will, were admissible to show what papers constituted the will which was executed and published by the testatrix; and it was held by Sir James Hannen, the president of the court, that the case of *Sugden vs. Lord St. Leonards* covered and controlled the point. He says: "But I am also of opinion that statements made by a testator after the making of the will, not merely with reference to the contents of the lost instrument, but with reference to the constituent parts of it are admissible. That has been decided by the court of appeal in *Sugden vs. St. Leonards*, and there is no distinction between this case, where the question is what formed part of the will, and the case where the whole will is lost. . . . The present question is, whether these two papers were joined together, or were before the testatrix at the time she signed. But the questions of law would not be different if the suggestions were that the first sheet was a forgery or an interpolation by somebody after the event. In such a case, could it be said that in order to establish that this sheet was a genuine part of the will, evidence could not be given of a statement of the testatrix before she made the will, that she was going to dispose of her property in the manner in which

it appears to be left in the paper alleged to have been interpolated. And, in my opinion, it is also the law that statements to the same effect subsequent to the making of the will would also be admissible to show what was the state of the testatrix's mind and intentions, just as it would be an ingredient in the consideration whether or no a supposed interpolated sheet were a part of the will at the time of its execution.

"I think that the case is governed by the decision of the court of appeal in *Sugden vs. St. Leonards*, and that any statements of the testatrix, whether made before or after the execution of the will—for I see no distinction between them—are admissible in evidence, with a view of showing what were the constituent parts of the will."

When it is borne in mind that the author of this opinion is the author of that appealed from in *Sugden vs. St. Leonards*, and that the opinion there was affirmed with high encomiums upon the learning and ability of Sir James Hannen by that appellate court, it would seem to us that the construction he put on the former case must be correct beyond all cavil and dispute. And what is that decision, as applied to the case of *Gould vs. Lakes*? It is that parol evidence is admissible to show what papers—what sheets and pages of a paper knit together—constitute a will executed in the presence of witnesses who could not swear to the identity of the papers at all; that statements of the testator, both before and after the execution of the will, both written and oral, are admissible to establish the constituent parts of the will, and identify certain papers as the will, when none of the witnesses to it could identify those parts to be part of the will.

In the case before us, the point for the propounders is much stronger. It is whether the statement made by the testator to the scrivener of a codicil to the will, who was also instructed to examine the legality of the will itself, is admissible to show that ten pages fastened together are the will, and the whole will of the testator, there being

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some confusion about it on account of the number of pages stated to be in it, and the attention of testator having been called by the scrivener and confidential adviser to that confusion of numbering the pages?

In Gould *vs.* Lakes the question was, did the outside sheet make part of a will it enclosed, whose pages were numbered 1, 2, 3, 4, thus not counting that outside sheet at all; and testimony, not of Tremayne, who was the witness and officer who wrote the attestation clause of the will, but of anybody who heard testatrix express herself touching the contents of that outside sheet as part of the will, was admitted to show that it was part of the will. In this case, the question is, did another page, marked 10, constitute part of this will when executed, or when executed, was it just as it is now? And the testimony of Alexander, the scrivener and confidential adviser of testator, was admitted to show that no other number 10 was in testator's will when executed, but the whole will, just as it now stands, is the only will executed and republished by the explicit statement of testator to him, when each page was read over to testator, and scanned by Alexander to see what changes he wished made, and was recognized by him as his full and complete will, and that, too, when the confusion about a possible missing page was made known to the testator by the witness.

It is inconceivable, if such testimony be admissible at all, that a stronger case for its admissibility and sufficiency to identify the constituent parts of a will, by the recognition of each and all the parts by the testator, can be made by any set of facts.

So in the case of the Goods of Braddock, 1 Probate Div., L. R., p. 433, it was held that a codicil was entitled to probate, where the witnesses to its execution signed their names on the back of a will to which the codicil was attached with a pin, upon evidence *alium-7e* that the papers were attached with the pin when the codicil was executed, and that the intention of the witnesses, by their subscrip-

tion on the back of the will, was to attest the signature of testatrix at the foot of the codicil.

See also Dickinson *vs.* Stidolph, 2d C. B. R., New Series, p. 339, which is to the effect that where two memoranda are referred to and only one found, that found will be given effect, the contents of that lost being uncertain; "for (say the court) either the ordinary presumption will be applied, that the missing paper was destroyed *animo revocandi*, or the principle must be applied, that the apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property, which are unknown, by reason of the testamentary paper which contained them not being forthcoming. It is on this principle that a subsequent will is no revocation of a former one, if the contents of the subsequent will are unknown. And the law is the same, even if the later will be expressly found to be different from the former, provided it be unknown in what the difference consists."

See again notes to 3 Phill., 434 (444-445, top pp.); Blackwood *vs.* Damer and Lord St. Helens *vs.* the Marchioness of Exeter; Fawcett *vs.* Jones, *Ib.*, top p., 455, *et seq.*; Bayldon *vs.* Bayldon, 3 Addams, 509; and Travers & Edgill *vs.* Miller, *Ib.*, 506; Greenough *vs.* Martin, 2 Addams, 239, top p. 286. In the last named case, it is expressly ruled by Sir John Nicholl that "in a court of probate, what instruments the testator meant to operate as and compose his will, is to be collected from all the circumstances of the case." In Draper *vs.* Hitch and others, 1 Haggard, 674, top p. 289, the same principle is ruled by the same judge, that parol evidence is admissible in a court of probate to explain an ambiguity on the face of the will, but the facts proved must completely remove the ambiguity.

So in Methuen *vs.* Methuen, 2 Phillim., 416, top p. 290, the same judge ruled that "the same rules do not apply in a case relating to the *factum* of a will which would apply if the inquiry were concerning the construction of it. In the court of probate, the whole question is one of

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intention ; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court. Suppose that in a case of fraud, or in a case of error, the residuary clause is omitted, it may be inserted by the court. It is admitted, that if there is doubt on the face of the papers, the court may admit parol-evidence." So in *Rees vs. Rees & Rees*, 6 Moak's Notes, 365, 3 Prob., and Div., 84, it was held by Sir J. Hannen that where "the will of deceased had been engrossed by a law stationer on fifteen brief sheets of paper consecutively numbered ; on the sixteenth sheet the testator had written a codicil, and on the eighteenth and last a schedule of property referred to in the will ; on the death of testator, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used in substitution of the fourth by the testator, and the several sheets were tied together with tape ; the legal presumption that papers bound together, and constituting the will as found at testator's death, was not rebutted by the circumstances of the case."

But it would seem to be useless to follow the adjudications further on the subject of the admission of parol evidence to explain ambiguities, outside of this state. The question also arises whether, though the will, as executed in July, 1881, may have been altered by the testator after that execution, yet if republished by the codicil by being referred to therein and annexed thereto, it is not made valid thereby. Such is the law conceded by the caveators, it is believed ; but whether so conceded or not, such is the law. See 1 Jarman on Wills, bottom page, 114 *et seq.*, top p. 260 *et seq.* ; 1 Williams on Ext'rs, bottom page 212, top p. 251 ; 1 Redfield, 368 (3), (4), 371 (6) ; 2 Notes of Cases, 406 ; 4 *Id.*, 79. It is true that "an unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless it be proved affirmatively by extrinsic evidence that the alterations were made before the codicil," which shows that the proof may be made by

extrinsic evidence, and if so made the alteration will be made valid. 1 Jarman, bottom p, 121, and cases cited. See also the Goods of Sykes, 3 Prob., and Div., 26, 5 Moak's Eng. R., 521; 3 B. Monroe (Ky.), 390, and cases there cited; 1 Burrow's R. 1549, Carlton. *ex dem.* Griffin, vs. Griffin; 16 Vesey, Jr., 167; 1 C. & M., 42; 1 Ves. & B., 445.

These references to able text-books and cases decided show that by the English law parol evidence is admissible, first, to explain certain ambiguities, for the most part latent; secondly, to show what papers constitute a will offered for probate, with the attesting clause and witnesses signing according to law; thirdly, that this parol evidence may show the identity of the will with the paper propounded, by statements of the testator at the time of the execution, before the execution and after the execution; fourthly, that greater latitude is given to the admission of parol evidence on issues of probate than of construction of the will after probate; fifthly, that a codicil, expressly affirming a will which could not convey realty, or was illegally executed, if that codicil be legally executed, made the will valid, especially if annexed to the will; and sixthly, that a will identified, in part, will not be refused probate as to that part, because of the uncertainty of other probable parts, the contents of which lost or missing parts are unknown. And these adjudications are not affected by or based upon any statute of Victoria or other modern law, but are constructions of the old law.

How do the Georgia statutes and adjudications of this court affect this law? So far from detracting from its force, we think that the laws of this state not only affirm it, but enlarge its scope in many respects.

On the question of the admissibility of extrinsic and parol evidence, the Code of this state greatly enlarges it to explain ambiguities. Section 2457 provides that "when called upon to construe a will, the court may hear parol evidence of the circumstances surrounding the testator at

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the time of its execution, so the court may hear parol evidence to explain all ambiguities, both latent and patent."

So section 2472 declares that "the destruction of a will, expressly revoking all former wills, does not revive a former will, unless subsequently republished. In such cases the republication may be proved by parol;" that is, a dead will may be brought to life by parol. So in section 2431 it is declared that, "if a will be lost or destroyed subsequent to the death, or without the consent, of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate and record in lieu of the original; but in every such case the presumption is of revocation by the testator, and that presumption must be rebutted by proof." What sort of proof? In *Kitchens vs. Kitchens*, 39 Ga., 168, this court construed the last cited section, and held that the presumption could be rebutted by any such proof as clearly satisfies the conscience of the jury, either by the subscribing witnesses, or any other competent testimony, and in case of conflict, the jury must decide, and that where there is evidence to sustain the verdict in such a case, a new trial should not be granted. Chief Justice Brown, in delivering the opinion, says that "the facts may be proved by such other evidence as satisfies the conscience of the jury" that the presumption is rebutted; and adds: "Indeed, it very rarely happens that the three subscribing witnesses hear the will read, or know anything of its contents. And, on the other hand, it frequently happens that some friend of the testator does know the contents of the will, who is not a subscribing witness, while others may know what disposition has been made of the will since the testator's death."

Thus the court there opened the whole question of *devisavit vel non*, coming virtually before it on the immediate issue of *revocavit vel non*, to the introduction of *aliunde* and parol testimony. And in *Cobb vs. Jones*, 34 Ga., 458, the declarations of the testator, both before and after the ex-

ecution of the will, were let in to show intention to defeat the statute against the manumission of slaves.

So in *Patterson vs. Hickey*, 32 Ga., 156, five years before *Cobb vs. Jones*, this court held that "where the question is *revocavit vel non*, parol evidence as to the acts and declarations of the testator is admissible, although made at any time between the making the will and the death of the testator." Chief Justice Lumpkin, delivering the opinion, says: "*Revocavit vel non* is similar to the question of *devisavit vel non*, and is a question of fact for the consideration of the jury," citing Powell on Devises, 6, 34, and 3 Wilson, 508. He adds that, "all the courts agree that declarations made prior to, or at the time of the execution of the will, or its revocation, are admissible. The judicial mind, both in England and in this country, is divided as to whether it should not be so restricted. In some of the earlier English cases, as in *Nelson vs. Oldfield*, 2 Vernon, 76, this kind of evidence was admitted without question." And he also cites Lord Mansfield and Buller, J., in *Brady vs. Cubitt*, Douglas R. 49, to the effect that parol and every kind of evidence is admissible on such issue of fact. And after reviewing other English and many American decisions of eminent judges in this country, our own first Chief Justice thus announces the conclusions of his own mind: "Having thus, as briefly as I could, adverted to the conflicting decisions upon this vexed question, James Kent and Joseph Story, men unsurpassed for legal learning, being arrayed against Ambrose Spencer and Thomas Ruffin, to say nothing of Spencer Roane, than whom abler common law judges never presided in the courts of this country, and differing as I do from a worthy brother and associate, for whom and for whose opinions I have the highest respect, I must say that I have not a scintilla of doubt resting in my mind, that the testimony excluded should have been received by the circuit court."

So that it appears from this case of *Patterson vs. Hickey*, decided in 1861, that this court unanimously reached the

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conclusion arrived at in 1876, by the highest appellate court in cases of probate in England in *Sugden vs. St. Leonards*; and thus it is seen that the two first principles deduced from the English authorities are sustained and enlarged by our own statutes and our court in construing our statutes and those English cases.

Equally clear is the Georgia statute on the subject of the effect of the execution of a codicil on a will to which it is annexed. Section 2478 of the Code declares: "A codicil, properly executed and annexed to a revoked will, shall amount to a republication of the same. Any writing executed with all the formalities required for a will may operate as a republication. A republication of the same paper in the presence of three witnesses, who shall subscribe as additional attesting witnesses, shall be good. A parol republication in the presence of the original witnesses to the will shall be good."

Does not the spirit of this statute give the English adjudication on the same subject full force? Does it not enlarge the scope of that adjudication? It strikes us that it does. A codicil properly executed, if annexed without more, republishes that will. What will? Why, the thing annexed. Any writing properly executed may so operate as to republish. A republication of the same paper in the presence of any three witnesses who attest it additionally, will do, and a parol republication in the presence of the original witnesses will do.

In *Jones vs. Shewmake*, 35 Ga., 151, where the question was, whether lands acquired after the will but before the codicil passed by the will, this court held, Judge Lumpkin again delivering the opinion, that "*prima facie*, the execution of a codicil to a will of lands, so executed itself as to be capable of passing lands, is a republication of the original will, and the effect of such republication is to make the will operate in the same manner as if executed at the time of such republication, unless a special intent is manifested in the codicil

to restrain such operation and give it a less extensive effect. In other words, it brings down the will to the date of the codicil, making the will speak as if of that date. That is, both will and codicil should be taken as one entire instrument." As the law of Georgia then stood, after acquired lands did not pass by a will—since altered by our Code—so that the effect of that decision is that, by virtue of the execution of the codicil in the presence of three witnesses at that time and to that instrument, the will operated to take hold of and convey property which before it could not touch and did not convey, and that the execution of the codicil moulded itself into the will, making the twain one flesh, and thus vitalized what was dead when the will stood alone. If one palsied limb of the will were thus restored, why not another, two limbs, the whole body of it? So that the question here is still nothing but one of identity. If the paper given by the testator to Alexander, as a will previously executed, for his examination and the addition of a codicil to it, be the paper propounded here now, even if altered since its original execution, it became one instrument with the codicil, was vitalized by it so as to bequeath and devise Shorter's property, and was republished and made valid just as effectually as if it had been then re-executed itself. If a will, the whole of which had been killed dead, to use Judge Stephens's language in *Lively vs. Harwell*, 29 Ga., 515, by revocation, cancelling, obliteration, may be revived, why may not a cancelling or obliteration or destruction of part of it—a sheet or page—be healed by the same means? If the republication of it, as first executed and all annulled, by a codicil attached, and expressly ratifying and affirming it can revivify all, why may not the same mode of republication by codicil revivify just as many pages of it as the testator then wished to make with his codicil as one complete will? So this decision covers the rule in England.

So that the question comes to this, the same point: Conceding that after the execution of the will, it was

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altered, was it competent to show by Alexander that the identical paper offered for probate was read by him to Shorter, recognized by him as his will, referred to by his direction in the codicil and ratified and republished therein? And in the other view of it, the question is the same: Was it competent to show by Alexander that, notwithstanding the confusion in the numbers, the testator recognized this identical paper as the will which he had executed on the date and in presence of the witnesses named therein and referred to both as to date and witnesses in the codicil? And when the proof was admitted, is it sufficient, with the adminicular proofs, to set up the will under the law?

The cases cited from the English courts would set it up. How is it with the Georgia Code and decisions thereon? The Code, section 2457, *supra*, declares: "When called upon to construe a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of its execution; so the court may hear parol evidence to explain all ambiguities, both latent and patent." The law is that on the issue of *devisavit vel non*, wider latitude is allowed in letting in parol testimony than in the construction of clauses of the will which convey items of property. So that if the surrounding circumstances be admitted to construe the terms of the will, *a fortiori* will they be admitted on the issue of the *factum* of the will. Indeed, they are always so admitted. What transpires between the scrivener and the testator is that circumstance surrounding the testator more important than all others. What transpired therefore between Alexander and Shorter touching the codicil must go in as specified in the statute and over and over decided by all the courts; for the effect of the language of Judge Lumpkin, *supra*, is that all admit that the statements made then and before that date are admissible on this issue of will or no will. But the codicil refers to, and is annexed to, the other paper, and republishes something, identifying this paper in many

references to its bequests as that something. Shall the witness be cut off from telling what the testator said to him about that annexed paper, on which the codicil was framed, and without which the codicil cannot be executed? It would be very strange if such were the law. It would be as unreasonable as singular, especially as that paper, as well as the codicil, was submitted to his care as the confidential lawyer to put his mind upon and act in reference to both, and make both legal. If Alexander had written that other paper, as he did write the codicil, could he not identify what he wrote himself? If so, why can he himself not identify this paper, though in the handwriting of the testator, if he read it in the presence of the testator, examined it closely to make a codicil to its provisions, and therefore of his own knowledge is sure that it is the veritable paper he fastened to the codicil, and sealed them up together, and directed them to the ordinary in the presence and by direction of the testator? and why need it be identified by the other witnesses to the codicil or the will further than by their signatures thereto?

But in order to make assurance doubly sure, our statute goes further and admits parol evidence to explain all ambiguities, latent or patent.

Is there no ambiguity on the face of the will itself as to the number of pages? Most clearly there is. On the top numbering it is ten; in the body of the last page it is said the will is from one to eleven inclusive. So that there is ambiguity there. And taking the two papers as one instrument, there is still ambiguity, for the codicil continues to number from eleven as the last page of the will. Bearing in mind the rule that there is more strictness in confining parol testimony in construction of wills than on their probate, cannot this ambiguity be explained, and the identity of this paper as the will of July, 1881, be shown by Alexander?

It seems quite clear to us, after a careful consideration of the whole case, that it can be done. The truth is, the

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doors of justice open wider day by day to the admission of testimony, and this parol evidence to explain all ambiguities in instruments of all sorts is made legal by our statute law. Code, §2757. The testimony, by our own law, is therefore made admissible, and if admitted and believed, there is no room for doubt about the truth of the case. Ought it to be believed? His character is unimpeachable. He takes nothing under the will. He is wholly disinterested. He is corroborated by the reference made in the codicil unmistakably to items of the will; by the fact that the residuary clause numbered nine, with no alteration in that number, and in the handwriting of, and marginally signed by, the testator, is exactly where it ought to be, that is, immediately preceding the page which appoints the executors and attests the will; and thus the probability is very strong, almost conclusive, that there was no need of another page between nine and ten, and that, when the will was executed, no such page was there, though in the original draft there were probably eleven, but before executing the will the testator had reduced the number to ten; by the fact that there had been a former will, and loose sheets in the handwriting of testator were found, so that it is extremely probable that he used the pages whose numbers were altered from former drafts, and rewrote the residuary clause to Mrs. Hamilton, and put it, rewritten, exactly where it belonged, before the clause of attestation which was used by him as written and numbered before in the body of the page, but altered on top, as were other numbers on the top of other pages; by the fact that Mrs. Hamilton had been, to all intents and purposes, his adopted daughter, and nearer and dearer to him than any being his wife left behind her; by the fact that the college was also dear to him and was provided for by him next to her whom he had raised from infancy; by the fact that he had been thrown into close relationship with the kindred of his wife and dissociated from his own, so that naturally his heart-strings twined more closely around


them, and his affections for them from childhood were nurtured by their environment, and grew with their growth, and blossomed and ripened into this will and the large bequests it made to them; by the fact that this paper of ten pages is attached to the codicil, which itself, if other wills competing with this and completed were offered against it, would be conclusive, but as it stands is a powerful circumstance to show that the ten pages so fastened is the original will executed the 18th of July, 1881, just as it was then attested, and by the fact that the will in its essential features accords with the intentions of the testator in respect to the disposition he designed to make of his property as expressed to others than Mr. Alexander, and that each page of it is all his own handwriting and is signed by him on the margin of each, and thus is each separate page his will indubitably as to what is written thereon, and under the authorities cited, and our own adjudications could be set up, if part could not be. See *Morris and Wife vs. Stokes*, 21 Ga., 552.

Against the testimony of this disinterested and perfectly credible witness, thus corroborated, what do the caveators urge? Nothing, except that the testator republishes, by the codicil, "the will made by myself on the 18th day of July, 1881, and attested by W. F. Ayer, J. C. McDonald and J. B. Hine; said will is now ratified, approved and declared to be my last will in all respects, except in so far as the same is changed by this codicil;" and in that will on the last and attestation page are these words: "I nominate and appoint David B. Hamilton, Judge George Hillyer and Eben Hillyer to be executors of this my will, to carry the same into effect according to law, and which will I have written on the above and foregoing pages numbered from 1 to 11 inclusive, and identified by my name on the margin, and hereunto subscribed my hand and affixed my seal for its due execution, this the 18th day of July, 1881," and they insist that the will "so ratified, approved and declared to be his (my) last will," is not the paper offered, because

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the 10th page is missing, and the codicil uses the language that it is so ratified, approved and declared his will "in all respects, except in so far as the same is changed by this codicil." They insist that a particular will is referred to in the codicil, and not this one set up by the jury, because the codicil does not alter, but rather affirms it in respect to the numbering, by itself continuing to number 12, 13 and 14 on the top of its own pages, and that the law is, in such a case, that if that particular will be not produced, nothing is republished by the codicil, and that there is no legal proof that the missing page was out when the original will was executed. The point is not destitute of acumen, nor devoid of force; but if well taken, what part of this will would it pierce to death? What was on that missing page, if there when this will was executed? No human being knows. Therefore, the principle that the parts of the will identified would not fail of probate on account of a missing part, whose contents were unknown, would save much, if not all, of this will. Every special legacy, and all are special but one, is identified by the handwriting of the testator by his signature on the margin, and by numbers, most of them, all except two, unaltered, and within the numbers one and eleven.

Will a court conjecture that this absent page affected them? How could it? The testator made a codicil conceded to be all right, and that did not affect or alter either specific legacy, except as named to add to the college endowment, and to change the legacy to Milton A. Cooley in consequence of his death. Will a court seeking truth presume that others were altered by a missing page on the original will? We cannot think so for a moment. So that nothing is left for it to operate upon except the residuary clause and the legatee under it. Was there in it any provision that lessened that? It is unreasonable to think so. That residuary clause is numbered 9. It precedes the last page—the attesting page, originally 11, now changed to 10, and there is no alteration of a figure



or letter on that residuary-legacy page, but the next page is altered from 11 to 10. To a fair mind it would seem infinitely more probable that there was no such missing page when the will was executed, but that testator used the attesting page of a former will, or draft of a will, which was originally numbered 11, and when he re-wrote the residuary clause on page 9, and put it in the will he intended to execute on the 18th of July, 1881, he altered 11 on the top of the old page to 10, and put that in after the clear page making his residuary bequest, and neglected at the same time to alter the summary from 1 to 11 in the body of this old page so used; it is much more reasonable, I repeat, so to conclude, than that he put in his will after the residuary clause or page, and between it and the attesting page, something which cut down the residuum.

It is more reasonable to think so, because the residuary legatee was the apple of his eye, the little one whom he had raised, the womanly and loving nurse, who let him down as gently as loving arms could into his grave.

But, if cut down, how much must it be topped? Nobody can answer. To whom must that which she loses be paid? Nobody can tell. She is certainly his residuary legatee, nobody can doubt that. The clause that makes her so is in his handwriting; his name is on its margin; he numbered it on top 9; that number is within 1 and 11, and there is no sort of suspicion about letter or figure on that page. If a court of justice should construe her to have nothing, it would be to dethrone itself, and seat injustice in its stead. If asked to take from it something and give it to somebody, surely the court may inquire how much, and to whom? The only answer echo makes is, "How much and to whom?"

But the codicil refers to the will, and identifies what it is otherwise than by the words "in all respects," etc. It makes allusion to sundry specific legacies in the will unmistakably, by implication strongly to a residuary legacy, and to a book in which certain accounts are kept.

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So that the words "in all respects" become themselves ambiguous as to what they allude to. The language is "in all respects, except in so far as the same is changed by this codicil." The codicil changes it only as regards legacies, bequests, not as to figures. Figures, in all probability, were not in the mind of testator or scrivener. Were they or were they not, is ambiguous at least, and under the Georgia statute may be explained, whether latent or patent. And so may the figures, the paging, the position of the residuary clause, of the attesting clause, the alteration of some paging, none in others, the change of one page on top to 10 from 11, and 11 unaltered in the body of the same page, all make ambiguities patent on the face of the will, and in the references of the codicil thereto, and thus all are open to explanation by parol evidence, both of what the witness himself did and knows of his own knowledge, as of what the testator said to him at the very time he was instructing him what changes he wished made in the will which he wished him in the codicil to republish. And when that testimony is in, all doubts vanish, as with the aid of the face of the papers themselves, the improbability of tampering with a will and not altering the body paged figure 11 as well as the top paged figure 11 (fraud puts out its tracks better than that), the cancelled loose sheets, and others found, and the accordancy of the will with the avowed purpose of the testator long entertained,—all the evidence shines upon the case, the clouds disappear and the light is let in, so that the truth beams clearly on the inquiring mind.

After a most careful study of the case and the law applicable thereto, my mind settles in the conviction that nothing outside of my personal knowledge, and dependent upon human testimony, is more morally certain to me, than that this codicil, with the ten pages of what purports to be a will attached to it, is the disposition, and the whole disposition, which Alfred Shorter desired to make, and according to law did make of his property at his death.

See further, 21 *Ga.*, 552; 7 *Ib.*, 438; 28 *Ib.*, 382, 104-5-6; 32 *Ib.*, 325, 156; 14 *Ib.*, 596, 375-6; Williams on Ext'rs, bottom p. 353, *et seq.*

5. There was no error in striking the jury from the grand jury list. Acts of 1869, p. 141, Code, §§3925, 3926. The judge has the discretion to do so in trying issues in civil cases. This is an issue in a civil case. The fact is that, as by the constitution they are composed of the most intelligent men, the discretion is wisely exercised.

6. There was no error in the charge and refusals to charge on the subject of the will being unnatural. By the law of God, man and wife are one, and her kindred are his. The same rule is applied by human law in selecting jurors and in respect to the credibility of witnesses, to the wife's kindred equally with the husband's, where the issue is the husband's impartiality or credit. It was more natural, really, in the case at bar, that the testator should have given his property to his wife's kindred, who grew up around him, and associated with him, especially to those whom he raised from infancy, than to his own, whom he rarely saw and scarcely knew.

7. There is not enough evidence on the issue of undue influence to raise a question about its exercise by anybody over such a man as Shorter was, in the legal sense of undue influence, and therefore there was no error that hurt in the refusal to charge as requested thereon.

8, 9. In ruling and charging to the effect that parol evidence could not change, add to or contradict the writing, but where there were ambiguities they could be explained by it, whether latent or patent, and in refusing requests which militated against this view of the case, there was no error. In our judgment, there were ambiguities needing explanation, as heretofore considered, and therefore the court should not have charged on the theory that there were none.

So in respect to the admission and effect of parol evidence to identify the paper propounded as the will of the

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decendent, under the views already submitted, there was no error ; and in comparing the requests to charge refused, given or modified with the charge itself, we see no material error which, in view of all the facts before the jury, satisfies us that the ends of justice demand a new trial. On the contrary, the general tone of the charge is fair, the issues are fully and fairly submitted and commented upon with entire impartiality, and a different result could not have been reached, in view of all the facts and the law applicable thereto.

10. We hesitated much on the denial of the continuance, in view of the fact that some heirs at law had but recently been made parties, and one witness on the question of undue influence had not been examined by interrogatories and was under promise to be present, and her presence was very desirable, as stated by counsel. But in the light of the rule that motions to continue are much within the discretion of the presiding judge, and unless that discretion has been abused and the ends of justice demand it, the rule is inflexible that this court will not interfere, and having carefully examined the evidence which counsel hoped to procure, and failing to see a probability of a change of the verdict on undue influence, or that there ought to be a change of it on that evidence, we do not see how, without departing from a long current of authority from first Kelly down, we can control the discretion of the presiding judge. Nor do we see that the other point is stronger, to-wit, that certain clients had just been made parties. They lived in other states; they could not have been of much use on the issue of undue influence; most, if not all, were infants; the great issue in the case was upon legal questions on the admissibility of the testimony of Mr. Alexander, on the admissibility of testator's statements, on the words and figures of the will and codicil, whether plain or ambiguous, upon which questions it is quite difficult to see how strangers and infants could throw much light and contribute much strength to so able an array of coun-

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cil as represented the caveators, especially as it is not hinted that either absent client was a lawyer.

Besides, we feel satisfied with the verdict. It is right on the law and facts. It is indeed a verdict. The truth is said by this jury; and no technical objection to rulings on evidence, or to charges not affecting the merits, or difference of opinion between members of this court and the presiding judge below on the point whether we, if on the *nisi prius* bench, would have exercised the discretion then lodged in us differently from his exercise of it, would, in such a case as the review of the law and facts of this make it, justify us in awarding a new trial over the head of the circuit judge.

Judgment affirmed.

HALL, Justice, concurred, but furnished no written opinion. He stated, on the subject of the continuance, in addition to what Chief Justice Jackson had said, that persons could not enter a litigation and be made parties for their own benefit, and then claim a delay merely because they had been so made.

BLANDFORD, Justice, dissented, but furnished no written opinion. He was of opinion that a continuance should have been granted.

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1. While it is the duty of the plaintiff in error to specify the errors complained of, this has been substantially done in the present case by setting out and assigning error on the charges given and refused.
 2. Inadequacy of price is not sufficient *per se* to set aside a sale, unless it is so gross as, when combined with other circumstances, to amount to fraud; but if it be great, it is of itself a strong circumstance to evidence fraud; and this is true where it is attended by any other fact showing the transaction to be unfair or unjust, or against good conscience.
- (a.) While irregularities in bringing on and conducting a sale will

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not alone affect the rights of an innocent purchaser, who is bound only to see that the sheriff has competent authority to sell, and that he is apparently proceeding to sell under the prescribed forms, the rule is different where the estate against which the execution was proceeding was greatly damaged by the misconduct of the sheriff and others, and the purchaser was not an innocent purchaser, but had notice of the facts, or reasonable grounds to cause him to inquire concerning them.

3. Courts have full power over their officers and their acts in making execution sales, so far as to correct wrongs and abuses, errors, irregularities, mistakes, omissions and frauds; and whenever they are satisfied that a sale made under process is infected with fraud, irregularity, or error, to the injury of either party, or that the officer selling is guilty of any wrong, irregularity or breach of duty, to the injury of the parties in interest, or either or any of them, the sale will be set aside; and so also where there has been a wilful disregard of the law as to the manner of selling.
4. A sheriff cannot raise by sale under execution a greater amount of money than by the writ he is commanded to make, with costs, and if the land sold be susceptible of subdivision so as to sell a less quantity, and raise only the amount of money required, the sale of the whole will be set aside, unless the separation and sale would have tended to impair the value of the different parts when so separated.
 - (a.) The subdivision for the purpose of sale must be discreetly made with a view to the interests of all concerned. Therefore, where an officer sold the central portion of a tract of land to his own son-in-law, and it was so taken out of the tract as to greatly impair the value of the residue, and to cut off direct communication between the remaining parcels, it was an abuse of the process of the court, especially where the land sold much below its true value; and the court will set aside such a sale, both for the improper conduct of the officer, and for inadequacy of price.
5. The charge requested should have been given, and that given was error.
 - (a.) An illustration, given by way of example in connection with a correct principle of law, is not error, unless it has a tendency to mislead the jury.

April 8, 1881.

Executions. Levy and Sale. Practice in Supreme Court. Title. Fraud. Notice. Before Judge FAIN. Ca toosa Superior Court. August Term, 1883.

Reported in the decision.

W. K. MOORE ; R. J. McCAMY, for plaintiff in error.

McCUTCHEN & SHUMATE ; W. H. PAYNE, for defendants.

HALL, Justice.

The complainant, as administrator of Allen Chastain, deceased, instituted his suit on the equity side of the superior court of Catoosa county, against W. T. Blackford, J. S. Glenn *et al.*, in which he alleged as follows :

That his intestate, in his lifetime, was the owner of certain real estate in Catoosa county of great value, and that he conveyed said lands by deed to one W. T. Blackford, for a farm which Blackford was in possession of in Tennessee; that Blackford gave him a mortgage on the farm he traded to Blackford in Catoosa county, to indemnify him from loss by reason of an alleged lien on the Tennessee lands, which Blackford assured Chastain was of no validity; that a bill was then pending in the chancery court of James county, Tennessee, to set up said lien; that said suit was ended by final decree setting up the lien for an amount as great as the value of the land; that Blackford was guilty of fraud, etc; that he was insolvent and unable to respond in damages; that complainant's intestate had filed a bill in the superior court of Catoosa county, alleging said facts against said Blackford, and that it had proceeded to a final decree setting aside said trade made with Blackford, and revesting in complainant's estate the land in Catoosa county as fully as if no trade had been made with Blackford. Complainant further alleged that in March, 1881, his intestate died, and that at his death there was a small judgment against him in the justice's court of ——— district, Catoosa county, for a total of principal, interest and costs, less than forty dollars; that the family of said Chastain lived in Tennessee, and knew nothing of said debt, which was levied after the death of said Chastain, on the farm aforesaid in Catoosa county, worth \$2,000.-00, and that it was advertised for sale in May, 1881, but the

Parker, administrator, vs. Glenn *et al.*

sale was postponed; that it was again advertised for sale in June, and again postponed, and re-advertised for sale in July, 1881, when one of the lots, worth fifteen hundred dollars, was sold for \$50.50 to one J. S. Glenn; to attack this sale the present bill was filed, and as cause why it should be set aside, it was alleged, that while the first action against Blackford was pending, he fraudulently procured the levy of this small *fi. fa.*, so that he may get the property sold so as to avail himself of a defence in the pending suit; that the levy was excessive, and that the parcel sold was the most valuable of the tract, it consisting of three tracts, lying in the same range of lots, either of which would more than have paid off the judgment, and that the sheriff selected the middle lot, thus leaving the remaining two tracts separated from each other by half a mile; that there were parties going to bid at the sale, and would have gone, and would have made the land bring something like its value, but that said Blackford and his attorney and the sheriff told such bidders that Blackford was going to claim the land, and there would be no sale; that Blackford had a claim prepared in *forma pauperis*, and swore to it, and on the way to the court-house, the sheriff and Blackford's attorney stopped in at the house of a person who was going to the sale, and would have bid, if he had gone, an amount much larger than it was sold for; that the sheriff or the attorney asked said person what was the lot on which the improvements were, and was told by him; when he asked if the land was going to be sold, and they replied that Blackford was going to claim all that he had bought from Chastain; that this conversation was heard by another, and that both he and the party from whom they sought the information were thus kept away from the sale; that the said Glenn went to the sale, knowing what had been done, and collusively bought the property as aforesaid; that Blackford bid against Glenn a few times to deceive the small crowd present, numbering not more than six to one dozen. Blackford owed Chastain more than

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enough to pay off the *fi. fa.* and prevent the sale. Complainant had offered to pay Glenn his money and interest, and more, if he would re-convey the land to Chastain's estate. Complainant waived discovery and prayed for relief, making Blackford, Glenn and Mrs. Smith, who had bought with notice, parties defendant.

The complainant's testimony substantiated most of the material statements and charges of his bill, and was only partially overcome by that offered by the defendants, who denied all personal participation in the fraud charged as to keeping away bidders, and all notice that it was done by others.

At the close of the evidence, complainant requested the court to charge as follows: "Inadequacy of price alone is not sufficient cause for setting aside a sale which is in other respects unexceptionable, but when the inadequacy of price is very great, such as to shock the moral sense, and is connected with other circumstances, either of fraud or irregularity, and particularly when surrounded by indications of hardships or unfairness, the sale will be set aside. So, when the inadequacy of consideration is great and the notice of sale given by the officers is vague, or from any act of his, bidders are kept away from the place of sale, who would have bid for the land if there, an unconscionable advantage was obtained by the purchaser, who bid off the land at a grossly inadequate price, a court of equity will interfere and set aside the sale so made. Equity will not allow a person so purchasing to take advantage of a sale so made. The jury will see that something more than mere inadequacy of price must appear, such as a want of due advertisement, or some unusual circumstances, to keep bidders away, and thus produce the result. There are cases where sales will be set aside where no fraud or other wrong-doing of the purchaser is charged or proved; such as where, by storm or flood, or other unusual circumstances, persons have been kept away from the sale, who would otherwise have been present. These are simply

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cited by the court as instances, and by way of illustration, the rule being that any unusual circumstance which operates greatly to the injury of the party complaining, and which would give the purchaser an unconscionable advantage, would be sufficient to set aside a sale." This request of complainant the court declined to give, and complainant excepted.

Instead of this written request to charge, the court gave the following, to all of which complainant excepted:

"Something more than mere inadequacy of consideration must appear, something that would keep away bidders, which was known to the purchaser, and of which he took advantage, and knowing that he was thus obtaining an unconscionable advantage. There are cases where sales will be set aside where no actual fraud or other wrongdoing of the purchaser is charged or proved; for example, when by storm or flood, or other unusual known circumstances to the purchaser, whereby the people have been kept away from the sale, who would otherwise have been present and bid."

"If the sheriff or other person, by any remark or course of conduct, kept a bidder or bidders away from the sale, and Glenn did nothing and said nothing to keep away bidders, and did not know that the sheriff or other person had done or said something to keep away bidders, that would not affect Glenn's title. If he did nothing, said nothing and did not know that other persons had done or said something to keep away bidders, he would, nevertheless, get a good title, so far as this matter is concerned."

"If Glenn did nothing and said nothing to keep away bidders, or to depress bidding, or to cause the land to bring less than it otherwise would have done, and had no notice that any other person had done or said such things, and if the sale was apparently regular, and there was nothing apparent to show Glenn that persons had been kept away, then he got a good title, notwithstanding the price was inadequate. Inadequacy of consideration, however great,

alone, will not be sufficient to set aside a sale, nor can inadequacy of price be coupled with the acts or sayings or conduct of others, in which Glenn in no way participated, and of which he had no knowledge or notice by information, or the circumstances surrounding the sale, to affect his title, provided the sale was apparently fair."

"The sheriff had the right, in the execution of his honest judgment, to sell any of the lots or parts of lots levied on, which, in his judgment, would make the money. If the part sold, being a separate lot, would so cut up and divide the remaining portion that it would be less valuable, Glenn would not be affected by that fact, unless he directly or indirectly influenced the sheriff to sell the particular parcel sold. If anybody is damaged by the sale of a particular portion of the property, instead of some other part thereof, it is a question between such injured party and the sheriff. In this case no issue is made as to the fact."

If the request of complainant contained propositions of law applicable to the case as made by the pleadings and proof, and should have been charged to the jury, then it follows that the charge given was erroneous.

1. It is urged here, however, that it is not shown by the bill of exceptions in what the alleged errors consisted, either in the refusal to charge as requested or in the charge as given, and that for this failure to specify the errors, if any portion of the former be incorrect, and if the latter is not erroneous in all its parts, then the complainant, under the rule prescribed by the Code (§4251) and the settled practice of the court, can take nothing by his writ of error; especially is this so, where he has failed to make a motion for a new trial, which has been refused.

It would perhaps have been better had the motion for a new trial been made, and had the errors alleged in the charges complained of been more definitely and minutely specified; but we are not prepared to say, in this instance, that there has not been a substantial compliance with the rule. The separation into the distinct heads that

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make up the entire request to charge, might have amounted to nothing more than a submission of abstract principles, which, however correct in themselves, would not have been applicable to the entire case as made, and would have resulted in confusion, which might possibly have misled the jury. The charge as given was separated into distinct heads and was somewhat minutely subdivided. There is a necessary connection between the various parts of the request and of each of them, and they follow each other in natural and logical sequence. While the literal enforcement of the rule, which we recognize, and to which we adhere as both expedient and wise, might, in a case situated as this, work great injustice to parties, and while there might be much doubt as to the propriety of its rigid application to a case circumstanced as the present, and we might think it safest to adopt a somewhat more reasonable and indulgent course, yet it is not indispensable to relax it in the present instance, for in our view there is not a single proposition in this long request to charge that is not sound law.

2. Inadequacy of price is not *per se* sufficient to set aside a sale, unless it is so gross as, when combined with other circumstances, to amount to fraud (Code, §2647); but if it be great, it is of itself a strong circumstance to evidence fraud (*Id.*, §§2742, 3179); and this is true, where it is attended by any other fact, showing the transaction to be unfair, or unjust or against good conscience. *Id.*, §3190.

This is unquestionably the law in cases of private sales or contracts. Why, then, should it be otherwise in cases of sales under execution? Why should not this fact, when accompanied by circumstances of fraud or irregularity resulting in great hardship and unfairness to one of the parties, such as a grossly excessive levy upon property otherwise unincumbered, worth, at a fair valuation, thirty times as much as the amount of the *fi. fa.*, have this effect upon such a sale, especially where the levy is upon land which consisted of three distinct though contiguous lots,

lying in the same range, and the centre lot, which is much the most valuable of the three, is brought to sale, thus widely separating the remaining lots, each of which would, if fairly sold, have brought, according to the uncontradicted evidence, much more than enough to have satisfied the demand in question, and by this wanton and reckless separation impairing the value of the complainant's property? Why is not his claim to relief greatly strengthened, when there is evidence going to show that the steps leading to the sale was so ordered as to induce the conclusion that it might not take place, and when persons, who would have otherwise attended and bid, were prevented from doing so in consequence of these appearances?

No sufficient reason occurs to us why a purchase made under circumstances so unusual and so fraught with suspicion should be protected, or why a charge so modest as that requested by the complainant and so pertinent and apposite should have been refused.

While we do not question the soundness of the position that irregularities in bringing on and conducting a sale, will not alone affect the rights of an innocent purchaser who is bound only to see that the sheriff had competent authority to sell, and that he was apparently proceeding to sell under the prescribed forms (Code, §2628), yet we cannot shut our eyes to the fact that the estate which the complainant represents has been greatly damaged by the misconduct of the sheriff and others engaged in this transaction. Nor can we regard as an innocent purchaser, either in a legal or popular sense, by the widest stretch of charity, one who admits that he knew the amount of the demand, the situation and value of the land sold, the effect of the sale upon the price of the remainder of the body, the gross inadequacy of consideration; who bought on speculation; who a few days thereafter sold that for which he paid \$50 for one thousand dollars cash; who refused the amount of his bid when tendered; and who admitted his willingness to allow his co-defendant and associate, Black-

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THE SUPREMACY OF THE COURT
In the case of *Blackford v. Blackford*, the court held that the purchase of land by a decree of the court, to take his land by paying him \$100, though denying at the same time that Blackford had anything to do with his making the purchase, or that he made it with the understanding that he was to have the land by paying him therefor \$100. Taking this account of the matter to be true, there was surely enough here to have put any reasonable and fair-minded man upon inquiry, and to have led him to a knowledge of the real state of the facts—in short, to have affected his conscience with notice that he was making an unjust and inequitable, not to say an iniquitous, bargain, and was for a mere pittance stripping the family of the deceased of their valuable inheritance. It would be a lasting reproach to a court of justice if its arm was not long enough and strong enough to reach and to arrest the consummation of such a wrong. Fortunately, the power to vindicate right and to redress wrong like this is not wanting; it is inherent in courts, both of law and equity.

When the inadequacy of price is such as to amount to a badge of fraud, or, together with other circumstances, is such as to shock the moral sense, and particularly when surrounded by indications of hardship and unfairness, the sale will be set aside." Rorer on Jud. Sales, §§1081, 1087, citations in note. "But although this inadequacy will not alone be sufficient to set a sale aside, unless so gross as to raise a presumption of other cause, yet when inadequacy is combined with accident or appearances of fraud or unfairness, the sale will be set aside." *Id.*, §1095. So likewise will a sale be set aside, where injury results from misapprehension, caused either by the purchaser, or others interested in the sale, or by the person conducting it, and where the property of infants is sacrificed by the neglect, fraud or misapprehension of their guardian, relief will be given by setting aside a sale and ordering a resale. *Id.*, §566.

3. Many cases establish the full power of courts over their officers and their acts, in making execution sales, so far as to correct all wrongs and abuses, errors, irregularities, mistakes, omissions and fraud; and whenever they are satisfied that a sale made under process is infected with fraud, irregularity, or error, to the injury of either party in interest, or that the officer selling is guilty of any wrong, irregularity or breach of duty, to the injury of the parties in interest, or of either or any one of them, the sale will be set aside. *Id.*, §1099. So where there has been a wilful disregard of the law as to the manner of selling, the same results will follow. *Id.*, §1101.

4. A sheriff cannot raise by execution sale a greater amount of money, than by the writ he is commanded to make with costs, and if the land sold was susceptible of subdivision, so as to sell a less quantity and raise only the amount of money required, the sale will be set aside, unless the separation and sale would have tended to impair the value of the different parts when so separated. *Id.*, §1103. Though it is the duty of the officer to sell in parcels, or a less parcel than the whole tract, where a less quantity will subserve the purpose of satisfying the execution, yet the subdivision must be discreetly made, with a view to the interests of all concerned. Therefore, for an officer to sell the central portion of a tract of land to his own son-in-law, and so taken out of the tract as to greatly impair the value of the residue, and so as to cut off direct communication between the remaining parcels, is an abuse of the process of the court; and such an abuse is the more aggravated if the land be sold for a sum greatly below its true value, and the court will set aside such a sale, both for the improper conduct of the officer and for inadequacy of price. Rorer on Jud. Sales, §1100, citing *Hamilton vs. Burch*, 28 Ind., 233; *Lashley vs. Cassell*, 23 *Id.*, 600, both of which are directly in point and fully sustain the text.

In *Tiernan vs. Wilson and others*, 6 John. (Ch.), R., 411, Chancellor Kent held that the sheriff, under an execution,

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ought not to sell, at one time, more of the defendant's property than in the exercise of a sound discretion would appear to be sufficient to satisfy the demand, if the part selected for sale could be reasonably and conveniently detached from the rest and sold separately; that where, on an execution for ten dollars and twenty-five cents, the sheriff sold two lots containing together 446 acres, a moiety of which belonged to the defendant, and was worth above 800 dollars, for the sum of thirteen dollars, the sale would be set aside as fraudulent and void; and although there was no actual corruption or intentional fraud on the part of the sheriff, yet being guilty of very gross negligence and abuse of trust, he was decreed to pay costs. In this well considered case, he further held that these circumstances appearing at the sale were sufficient to charge the bidder's agent thereat with knowledge of all the facts that could affect the validity of the same, and to deprive his principal of the benefit of the purchase, although there was no sufficient evidence of any fraudulent combination between him and the sheriff.

In *Wallace et al. vs. The Atlanta Medical College*, 52 Ga., 164, this court, while preserving the right of parties to purchase at execution sales, where they were guilty of no fraud, as did Chancellor Kent in the above cited case, and protecting them in their purchases against mere irregularities, although the sale might be for an inadequate price, yet held the levy and sale void, where the injury to the defendant's property was wanton and great, whether so intended or not, and actually set aside the sale upon terms strictly equitable, such as were tendered in the case at bar. These principles are not in conflict with any of the other decisions of this court cited and relied upon by the indefatigable and able counsel for the defendant in error, except as to the remedy proper to be employed for the rescission of the sale.

5. The foregoing discussion vindicates the soundness of the charge requested by complainant in all its parts, and

the result reached is opposed to the charge as given. It was too narrow in its scope, and excluded from its operation the most material features of the case, as made by the pleadings and proof. There is nothing in the objection that the instance given in the charge, as an illustration of the principle insisted upon was not founded upon testimony. It was offered simply as an illustration, and was carefully guarded as to the purpose for which it was adduced, and even if it was erroneous, the court employed it in the charge which he gave the jury. An illustration given by way of example, in connection with a correct principle of law, however faulty, has been held not to be error, unless it had a tendency to mislead the jury. 33 *Ga.*, 207; 11 *Id.*, 226 (11 head-note). We cannot see that in this case it could have had any such effect; indeed, we think it was apt and well calculated to convey the idea that should have been impressed upon the jury.

Judgment reversed.

LOWERY vs. THE STATE OF GEORGIA

1. The testimony of a witness who was present when a homicide was committed, but who did not in any way participate therein, but for a time thereafter concealed the fact, is sufficient without other evidence to authorize a conviction. Such a witness is neither a principal in the first nor second degree nor an accessory either before or after the fact, and is not an accomplice, within the meaning of section 3755 of the Code.
- (a.) Even if such witness had been an accessory after the fact, this would not have rendered her an accomplice, within the meaning of that term as used in section 3755 of the Code.
2. The verdict was supported by the evidence.
3. Where a motion for new trial is made by a losing party, all errors must be embraced therein; otherwise, they will be considered as having been waived, the presumption being that the court below would have corrected these errors, if he had had an opportunity.

April 15, 1884.

Criminal Law. Accomplice. Accessory. Witness.

Lowery vs. The State of Georgia.

Evidence. Practice in Supreme Court. Before Judge MERSHON. Applying Superior Court. October Term, 1883.

Fletcher Lowery was indicted for the murder of John Brimage. On the trial, only one witness testified to the actual perpetration of the homicide, a woman, called Julia Blocker or Julia Bryant. Her testimony was, in brief, as follows: She had been living with defendant, with one or two interruptions, for two or three years. At the time of the killing, she was in the woods with Brimage. Hearing a noise, she peered under the bushes, but could not tell whether it was her little girl or defendant. She told Brimage to go in another direction, while she went to meet defendant, if it were he. She got up from where she was sitting and went towards the bushes whence the noise proceeded. When she got near to them, defendant rushed out with a pistol in his hand and said, "Oh, yes, God damn you, I have caught you now, and I will kill you." He rushed at her and she ran to him; he had the pistol "in her face." She grabbed hold of him; he seized her, and fired twice at Brimage over her shoulder or under her arm, she could not say which. Defendant then threw her down. Brimage closed with defendant and threw him down. Defendant regained his feet, seized his pistol and ran. Brimage was very bloody, both shots having taken effect in his breast and abdomen. After defendant ran, Brimage started to fall; witness put her hand under his arm to sustain him, but he fell to the ground, and expired with his head on her arm. She went back to the house. On the road she met defendant near an old hedge-row with a satchel in his hand and his coat under his arm. He had changed his clothes, and left at the house those he had on when the homicide was committed, and which had blood on them. He again threatened to kill the witness, but she told him not to do so, unless he could support her two children or get somebody else to do so. She also told him not to go away; that if he ran off, they would suspect him, offer a

large reward and catch him ; that he had better go home, and they would live like other people. He then told her to go to the house and take her clothes off, which she did, and he took all the bloody garments away. She went back to the body of Brimage and searched it. She found only two pieces of tobacco and a closed pocket knife. When she returned to the house, defendant cursed her, and told her that he had instructed her not to go out of the yard. He asked if she had found any money in Brimage's pocket, and took the knife and threw it away. She asked him if he was going to leave Brimage there, and said it would have to be told by somebody. He inquired if she were going to tell it. She replied, no, but somebody would. Defendant went back and threw the body further down towards the branch, dragging it by the legs. He then told her not to leave the lot, and went to get a settlement with a man who owed him. After the homicide, defendant said he was sorry for it. She responded that it was too late. He told her to keep her mouth shut; that she was "as deep in the mud as he was in the mire." She denied that she had done anything, but he told her that she would better keep silent. She told him that she could not stay there after what he had done. Defendant furnished her with the money to leave, and she left the day after the homicide and went to a railroad station a few miles away. It was understood between them that she was to stay until defendant sent for her. When the body of the murdered man was found, the sheriff went for her as a witness, and she at once informed him of the entire transaction.

Another witness testified that, on the preliminary examination, the evidence of Julia Blocker was substantially the same as on the present trial, and that after it was delivered defendant admitted that it was true; and this occurred while the witness (who appears to have been an officer of the law) was putting him in a cell.

The evidence for the defendant tended principally to

Lowery vs. The State of Georgia.

show that on the committing trial Julia Blocker had sworn that, when she met defendant at the old hedge-row after the homicide, she stopped him and told him not to go away; that if he did, they would suspect him, and offer a large reward for him; and that she told him to come back, and she would go, and they would not suspect him so quickly, and there would be nobody to tell who did it; and that she left the next morning. It was also shown that Julia Blocker was a woman of easy virtue, and had a husband, but had been living with defendant as if she were his wife; that she was also a woman of very violent passions; that the murdered man was missing until the Wednesday following the homicide; that the sheriff went to where Julia Blocker was, to inquire about it; and that she then told him that she had not seen Brimage, although she had an appointment with him that morning at a specified place where they were in the habit of meeting, and that a stick was stuck up there where they could find the place. The whistle of the train blew just then, and they hurried towards it. She followed behind the witness who narrated these facts, talking, but he did not hear her.

The defendant in his statement merely made a general denial of all knowledge of the murder, and stated that he was working in another place from that in which the difficulty occurred.

The jury found the defendant guilty. He moved for a new trial on the following, among other grounds:

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the court, on request, refused to charge as follows: "If you believe from the evidence that the witness, Julia Blocker, after full knowledge of the killing of the deceased, concealed it from the magistrate, and harbored, protected or assisted defendant, she thereby made herself an accomplice with defendant in the commission of the crime; and you cannot convict the prisoner on her evidence alone, unless she is corroborated by some other

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witness, or witnesses, or a chain of circumstances going to convict the prisoner of the crime committed; and those corroborating circumstances necessary to dispense with another witness must be such as to connect the prisoner with the offense; and it is not sufficient that the witness is corroborated as to the time, place and circumstances of the transaction, if there be nothing to show any connection of the prisoner therewith except the statement of the accomplice; the circumstances of the corroboration must be such as in themselves tend to fix the crime on the prisoner, though the accomplice may not have mentioned the fact at all."

(3.) Because the court charged as follows: "An accomplice is one who participates in the commission of a crime. The testimony of an accomplice, uncorroborated by other facts or circumstances to corroborate it, would not be sufficient upon which to find a co-defendant guilty. If you find she was an accomplice, that would go to her credibility, and you would have to look for other evidence or circumstances, or you would not be authorized to act on that and find the defendant guilty. In order, however, to find that she was an accomplice, you must be satisfied from the evidence that she participated in the crime and that she intended to do so."

(4.) Because the court charged as follows: "If you find, after going through the evidence, that she was an accessory after the fact, then that would also go to her credibility."

The motion was overruled, and defendant excepted.

The only ground of error assigned in the bill of exceptions was the overruling of the motion. In argument other errors were suggested, but the court declined to pass upon them, as stated in the third division of the decision

McLENDON & GRAHAM; SPENCER & WAY, for plaintiff in error.

Lowery vs. The State of Georgia.

C. ANDERSON, attorney general; G. B. MABRY, solicitor general, for the state.

BLANDFORD, Justice.

The main question in this case is, whether the testimony of a witness who was present when the homicide was committed, but who did not in any way participate therein, but who for a time thereafter may have concealed the fact, is sufficient, without other evidence, to authorize a conviction, under section 3755 of the Code.

This question must be answered in the affirmative. The witness, Julia Blocker, was not even an accomplice within any sense of that term. She did not participate in the crime as actual perpetrator of the offense, or as principal in the second degree. She was not accessory before the fact, and from the facts set forth, she was not even accessory after the fact. Code, §§4305, 4306, 4307, 4308. Even if she had been an accessory after the fact, this would not have rendered her an accomplice, within the meaning of that term as used in §3755 of the Code.

The charge requested by the plaintiff in error upon the subject of the testimony of an accomplice was properly declined by the court. And the charge as given by the court was fully as favorable as the accused had any right to expect, and under the facts of this case, we think more so.

2. The evidence submitted on the trial warranted the finding of the jury.

3. There were other points insisted on by the counsel for plaintiff in error, but we find, upon an examination of the motion for new trial, that they are not embraced therein. Where a motion for new trial is made by a losing party, all errors complained of must be embraced therein, otherwise they will be considered as having been waived; any other practice would operate unjustly to the court below, the presumption being that he would have corrected those errors, if he had had an opportunity.

Let the judgment of the court below stand affirmed.

BIRD *vs.* The Georgia Railroad.

BIRD *vs.* THE GEORGIA RAILROAD.

1. A carrier who receives goods to be carried over its own lines and over successive lines of transportation connected therewith, to be delivered at some distant point, acts as the forwarding agent of the owner in giving instructions as to the transportation of the goods; and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon them for the freight earned by it, unless the owner gave notice of the route and the lines of road over which his goods were to be transported.
2. If goods were shipped over a connecting line of roads, and there were two routes by which the terminal point could be reached, one of which was designated by direction of the consignee, who was also the owner, but they were, in fact, sent to the terminal point by the other route, if the road so wrongly receiving them knew of the direction as to their shipment when it received them, its transportation of the goods would be voluntary; it would have no right to charge freight for transportation, would have no lien on the goods for such charges, and could not retain possession for the purpose of collecting them.
3. A demand by the consignee and refusal by the defendant to deliver the goods would be a conversion for which trover would lie; and the county where such demand and refusal occurred would be the proper venue of the action.
4. Whether the carrier receiving and transporting the goods had knowledge of the direction that they should be transported by a different line, was a question of fact for the jury; and the marks on the goods, with other circumstances, could be considered in determining that question.

March 4, 1884.

Railroads. Damages. Negligence. Trover. Conversion. Contracts. Before Judge ESTES. Clarke Superior Court. November Term, 1883.

Reported in the decision.

GEORGE D. THOMAS, for plaintiff in error.

J. B. CUMMING, for defendant.

BLANDFORD, Justice.

The plaintiff in error brought his action of trover against

defendant. Upon the trial of the case, he showed that he shipped the goods sued for from Cincinnati and other points to Athens, Georgia. Bills of lading were taken by plaintiff, which specified that the goods were to be shipped from Atlanta to Athens via Richmond and Danville Railroad; on the packages of goods were marked, "John Bird, Athens, Georgia, via R. & D. R. R." The defendant company received the goods at Atlanta, from the Western & Atlantic R. R., and carried them to Athens. Plaintiff tendered the freight charges to Atlanta, and demanded that the goods be delivered to him. This demand was refused by defendant, unless plaintiff would also pay the freight charges from Atlanta to Athens, and asserted its right to retain the goods for its lien for such freight charges. It was also shown that there was a way-bill accompanying these goods, which indicated that the goods were to be transported over defendant's road. The court, among other things, charged the jury that "a deviation from the route over which goods are ordered to be shipped gives no rights of action, unless such deviation is accompanied with loss or damage." "A deviation by a railroad company from the route selected, and for which instructions are given by the shipper, will not amount in law to a conversion, unless such deviation is accompanied with loss or damage." "When goods are shipped over a specified route, which includes several connecting railroads, and one of those intermediate roads diverts the goods from such specified route, and sends them to their destination without loss or damage, the last road (although not in the specified route), will have a lien for its reasonable freight charges, and may hold the goods until such charges are paid, unless actual notice be given to such road by the shipper not to receive or transport the goods."

The jury, under these instructions, found for the defendant; whereupon plaintiff moved the court for a new trial, alleging as error the charges aforesaid. The court refused

the motion, and this writ of error is prosecuted to reverse the rulings of the court below.

1, 2, 3, 4. A carrier who receives goods to be carried over his own lines, and over successive lines of transportation connected with it, to be delivered at some distant point, acts as the forwarding agent of the owner in giving instructions as to the transportation of the goods; and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon the goods for the freight earned by it, unless the owner gave notice of the route and the lines of road over which his goods were to be transported. 6 Allen, 246. If the plaintiff's goods were to be shipped over the Richmond and Danville Railroad from Atlanta to Athens by the direction of the plaintiff, and if such direction was known to the defendant when it received the goods at Atlanta, the transportation of the goods, under these circumstances, by defendant to Athens would be voluntary, and for which it would have no right to charge freight for their transportation, and would have no lien on the goods for such freight charges, and consequently could not retain the goods in its possession for such charges. A demand by the plaintiff and refusal by defendant to deliver the goods would be a conversion for which trover would lie, and the county where such demand and refusal occurred would be the proper avenue of the action.

The main question in this case is, did the defendant know, when it received the plaintiff's goods from the Western and Atlantic Railroad, that the same were to be transported over the Richmond and Danville Railroad, or were the facts sufficient to charge the defendant with such knowledge? If so, then the defendant would have no right to demand pay for such transportation. The question whether defendant had such knowledge was a question for the determination of a jury, under the facts, and it would be proper for them to take into consideration the marks on the several packages of goods; did these marks indicate that the goods were to go by way of the Richmond

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and Danville Railroad? This, together with other facts submitted in evidence, should be considered, and they should find whether defendant knew that plaintiff had directed his goods shipped over another line of road than defendant's; and if such should prove to be the fact, the defendant would be liable in this action.

This question has not been fairly submitted for the consideration of the jury in the several charges of the court complained of.

Cases cited by plaintiff in error : Code, §719 (q); 68 *Ga.*, 623; 26 *Id.*, 619; 14 *Id.*, 283; 48 *Id.*, 85; Code, §2077; 25 *Ga.*, 707; Hutch. on Carriers, §§447, 491, 468, 443, 310; Lawson on Carriers, §11; 8 Gray, 262; 9 *Id.*, 231; 5 Cushing, 137; 1 Doug., 1.

For defendant in error: Hutch. on Car., 478; 6 Allen, 246; 105 Mass., 267; 8 Gray, 262, 266; 100 Mass., 515, 262; Sedgewick on Damages, 97.

Let the judgment refusing the new trial be reversed.

KEESE vs. COLEMAN & COMPANY.

In cases of insolvency, partnership property is first bound to pay partnership debts, and the individual property of the partners to pay individual debts.

(a.) Where a creditor held a mortgage on a stock of goods belonging to a firm and upon a horse belonging to one of the members of a firm, and by agreement between the owner of the horse and the holder of the mortgage, the horse was sold and the proceeds applied to an individual debt due by the owner to him, if subsequently the stock of goods were sold and the proceeds brought into court, in a contest over the fund by the creditors of the firm, both the firm and its members being insolvent, the sale of the horse and the application of the proceeds to the individual debt would not amount to an extinguishment of the mortgage *pro tanto*.

March 4, 1884.

Partnership. Debtor and Creditor. Insolvency. Mortgage. Liens. Before Judge CLARKE. Randolph Superior Court. May Term, 1883.

Reported in the decision.

W. C. WORRILL; A. HOOD, JR., by brief, for plaintiff in error.

W. D. KIDDOO, for defendants.

BLANDFORD, Justice.

Pulaski & Company held a mortgage on a stock of goods of Knighton & Keese, also on a horse belonging to Knighton, of the firm of Knighton & Keese, which mortgage was afterwards, for value, transferred to E. H. Keese, the father of E. A. Keese, which latter was one of the firm of Knighton & Keese. Knighton agreed with E. H. Keese, the transferee of said mortgage, that the horse should be sold, and the money arising from the sale of the horse should be paid to E. H. Keese, in discharge of an individual debt which Knighton owed E. H. Keese; the sum which the horse brought was one hundred and twenty dollars; and this was done.

S. T. Coleman & Company held a mortgage, executed by Knighton & Keese on the same stock of goods covered by the mortgage made to Pulaski & Company and transferred to E. H. Keese, junior to this last mentioned mortgage, but the same was not on the horse mentioned in the Pulaski mortgage. The goods were sold by the sheriff under foreclosure of these mortgages. S. T. Coleman & Company brought a rule against the sheriff, claiming that the money raised from the sale of the mortgaged goods should be paid to them on their mortgage, because they alleged that the Pulaski & Company mortgage, which had been transferred to E. H. Keese, had been paid off. E. H. Keese claimed the money because his mortgage was the older lien. The presiding judge charged the jury that the reception of the one hundred and twenty dollars by E. H. Keese from the sale of the horse by Knighton, and the payment of the same on an individual debt held by E. H.

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Keese on Knighton, operated as a payment *pro tanto* on the mortgage held by E. H. Keese as transferee from Pulaski & Company. And this ruling of the court below is here complained of.

The rule that partnership property is first bound to pay partnership debts, and individual property to pay individual debts, is well recognized. Code, §1913; 9 *Ga.*, 319; 19 *Id.*, 87; 21 *Id.*, 398; 27 *Id.*, 302; 28 *Id.*, 371; 47 *Id.*, 415.

The doctrine of a lien on two funds does not apply in this case. It seems to us, as the horse was the individual property of Knighton, and the partners and partnership insolvent, that the proceeds of the sale of the horse should have been first applied to the payment of the individual debt of Knighton due to Keese, as was done in this case. So we think the court erred in his instructions to the jury, and should have granted a new trial in this case.

Judgment reversed.

WILSON vs. GARRICK et al.

1. There was no error in holding that the defendants were *bona fide* purchasers of property sold under an order of court, notwithstanding a notification to them that it was being sold illegally; that the constable was selling without authority of law, and that whoever bought it would get with it "a first-class lawsuit." This was mere matter of opinion, unaccompanied by any reasons or grounds therefor; and moreover it was erroneous.
 2. Where a mule had been levied on under an execution returnable to a justice's court, and a claim had been interposed, but the property not replevied, an order from the justice for the sale of the property and the bringing of the proceeds into court to abide the result of the case, in order to save expense of keeping and prevent loss by deterioration of value or by death, was not rendered invalid because it did not fully recite the facts authorizing the sale, and that defendant had the requisite notice of the same.
- (a) Strictness of pleadings is not required in justices' courts.
- (b.) It will be presumed that the magistrate required proof of notice to the defendant.

March 18, 1884.

Wilson vs. Garrick *et al.*

Levy and Sale. Notice. Justices' Courts. Presumption. Vendor and Purchaser. Before Judge STEWART. Coweta Superior Court. September Term, 1883.

Mrs. Sallie Wilson brought trover against M. J. Garrick and W. L. Carlton to recover a mule. The facts were, in brief, as follows: A judgment was recovered by Brantly, agent for Austin & Ellis, against William Wilson and Sallie Wilson, and execution issued and was levied on the mule in dispute. Mrs. Wilson interposed a claim, alleging that it had been set apart to her as an exemption for the benefit of herself and children, but the property was not replevied. Plaintiff made affidavit before the justice that it was expensive to keep and was liable to deterioration, and prayed that the mule be sold and the money brought into court; and on the same day the magistrate granted an order to that effect, reciting that the case had been appealed to the superior court; and the sale was advertised and made by the constable on the next court day. Defendants claim under that sale, and its validity was the leading point in dispute. The application and order were objected to, but were admitted in evidence. They did not show notice of the application before granting the order. J. F. Methvin, Esq., for plaintiff, testified that at the sale one of the defendants asked him if he could safely buy the mule, and he replied that the mule was being sold illegally; that the officer was selling it without any authority of law at all, and that whoever bought it would get with it "a first-class lawsuit." Mrs. Wilson also denied service of the summons on which the judgment against her was founded.

The jury found for the defendants. Plaintiff moved for a new trial, on the following grounds:

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the court charged as follows: "Gentlemen of the jury, if you shall be satisfied from the evidence in this case (and I express no opinion as to what the evidence

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is) that the mule in controversy had been levied upon by a lawful constable under a *fiery facias* against the defendant, Sallie Wilson, who is the plaintiff in this action, and that plaintiff, said Sallie Wilson, had interposed a claim to said mule, but failed to replevy the mule or give a forthcoming bond in terms of the law, and that a claim suit was pending in court in respect to said mule, and that said mule remained in the hands of the constable, and that it was plainly made to appear to the justice of the peace of the district in whose court said claim suit was pending and in which the property was, that there was expense incident to keeping of the mule, and that it was liable to deteriorate in value, and an order for the sale of the said mule was made by said justice of the peace, and that said constable, in pursuance of such order, sold said mule on a regular sale day between the lawful hours of sale and at the established court ground, the same being the place where such sales are usually made, and the sale was fair and in accordance with the requirements of law, and defendant purchased the said mule fairly and innocently and in absence of all fraud or bad faith, then the plaintiff is not entitled to recover, and your verdict should be for the defendants. It is competent for the justice of the peace in such a case to order a sale of personal property of a perishable nature, and when such order is made by the justice of the peace, and the constable sells in pursuance of such order, and after observing all of the requirements of the law in such cases, and a person buys at such sale fairly and innocently and without fraud, then he gets the title; and in such case the verdict should be for the defendants."

(3.) Because the court admitted in evidence the application and order for the sale of the mule, plaintiff objecting, on the ground that they were not authorized under the law.

The motion was overruled, and plaintiff excepted.

METHVIN & HARDY, for plaintiff in error.

J. S. BIGBY; McLENDON & FREEMAN, for defendants.

HALL, Justice.

There is not a single error specifically set forth, either in the motion for a new trial, or in the bill of exceptions. The objections to the admission of testimony are the most vague and general, and should not have been noticed by the superior court. The entire charge of the court upon a particular question is claimed to be erroneous, without specifying in what the error consists, and while, under §4251 of the Code, we should, perhaps, refuse to consider these general assignments, yet, as they have been argued, we will pass upon them.

1. There was no error in holding that the defendants were *bona fide* purchasers of the mule in question, notwithstanding the notification to them that it was being sold illegally, and that the constable was selling without authority of law, and that whoever bought it would get with it "a first-class lawsuit." This was mere matter of opinion, unaccompanied by any reasons or grounds for such an opinion. The opinion was erroneous, likewise, as will be presently seen.

2. The mule had been levied on and claimed, but not replevied, and was in the hands of the levying officer. To save expense of keeping and prevent loss by deterioration of value or by death, the justice of the peace, to whose court the execution was returnable ordered it sold, and the proceeds of the sale held up to abide the result of the claim case. It is insisted here that because the order directing the sale did not fully recite the facts authorizing the sale, and that defendant had the requisite notice of the same, that it was void. This was an order from a justice's court, in which no great strictness or particularity of pleading is looked for or required. Besides, the statute does not require the facts to be set out in the order; it

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simply declares the duty of the justice, upon certain facts being made plainly to appear to him, to order the sale. Code, §3648. The omission in the recital of any one of them would amount only to an irregularity, at most, and would not affect the title of purchasers at the sale, under the order, as were the defendants in this case. It would be going a great way to presume that no notice was given to the defendant in the *fi. fa.* of the intention to apply for the order; the presumption, on the contrary, is that the magistrate did his duty by requiring proof of the notice, and this presumption is fortified by the fact that no effort was made to arrest the execution of the order because of the failure to give the notice required by the act.

It is admitted that the claimant had the right to replevy the property, and if she failed or refused to do so, then the plaintiff in execution might replevy it; and if he neglected or refused so to do, then the claimant might apply to the ordinary for an order to sell it. Act of 1870; Code, §§3734, 3735. But this is a case where none of these conditions were complied with; both claimant and plaintiff in execution failed or were unable to replevy, and the claimant does not show that she made any application to the ordinary. The case was not covered by this legislation, but by that of 1873 and 1880, embodied in §3648 of the Code, under which the order was taken. The defendants having purchased under this order, got a good title to the mule. The charges and rulings of the court were in accordance with these views, and appear to us to have been unobjectionable. Under these instructions and the evidence in the case, the jury could have returned no other verdict than they did.

Judgment affirmed.

VANDIGRIFT *et al.* vs. POTTS.

1. While a widow may sell land set apart as a year's support, on behalf of herself and children, when necessary in order to support them; yet where she re-married, sold the land and bought other land, taking title in herself and her second husband, the sale is not good.
2. The purchaser having bought fairly and paid full price, the husband and wife having the land bought with the proceeds of the sale, and the children having been in part supported from the land so bought, there are equities to be adjusted between the parties.
(a.) *Seemle*, that a bill in equity would be the proper remedy in this case.

February 19, 1884.

Year's Support. Sales. Title. Husband and Wife.
Equity. Before Judge ESTES. White Superior Court.
October Term, 1883.

J. M. Vandigrift and Sallie Wheeler (formerly Vandigrift), as heirs at law of E. A. Vandigrift, deceased, brought ejectment against Charles Potts. On the trial, the following facts appeared :

E. A. Vandigrift died in 1861 or 1862, leaving a widow and two children (the plaintiffs), who were then between ten and thirteen years of age; the widow obtained the land in controversy to be set apart to herself and children as a year's support; she married again in 1869; her second husband and herself joined in a conveyance of the lot in dispute to defendant on November 5, 1873; defendant paid for the property \$560.00, the payment consisting of a wagon, two mules, two notes of \$100.00 each, and \$60.00 in money. This had the approval of the ordinary endorsed upon it. The second husband bought another place for \$500.00, giving therefor the wagon and mules, and two notes received from defendant. The title, however, was taken in the name of himself and wife. The children lived with their stepfather, and were supported until about eight or ten years old; they worked while thus supported.

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The jury found for defendant. Plaintiffs moved for a new trial on the following, among other grounds :

(1.) Because the court charged as follows : "If you believe from the evidence that the widow sold the land in dispute after it had been set apart as a year's support, the presumption of law is, that it was sold for the purpose of supporting her family ; and the burden would be upon the plaintiffs, who attack the sale, to satisfy the jury that such sale was not made *bona fide* for the support of said family ; and that defendant knew that such sale was not made for the support of the family ; so that before the plaintiffs can recover in this case (if you believe such sale was made after it was set apart, as I have already stated to you), you must believe that the sale was not made for the support and benefit of the family, and that the defendant knew it, because if he bought *bona fide*, believing that the widow had a right to sell it for the support of the family, and that she was selling it for that purpose, then he will be protected in his title."

(2.) Because the court charged as follows : "If the jury find that the widow sold the property in dispute for the support of the family, as already stated, then if these plaintiffs recovered any benefit from the trade, or received any of the property received at such sale, or any benefit in the way of a home, then the plaintiffs must account to the defendant for the property so received before they can recover the land in this case."

The motion was overruled, and plaintiffs excepted.

C. H. SUTTON ; W. T. CRANE, for plaintiffs in error.

A. F. UNDERWOOD & SON ; J. J. KIMSEY, for defendant.

JACKSON, Chief Justice.

The year's support set apart for a widow and children was in land. Several years after it was so set apart, she married and sold the land. The children having arrived at *majority*, sued for their portion of the land, as heirs at law

of the father, and as entitled to their shares of the land so set apart. The jury, under charge of the court, found against them, and from the refusal of a new trial they excepted. The question is, can they recover?

1. We think that the marriage of the mother made a complete change of the relation of the parties and the status of the case. Her eye was no longer single towards the children. Her affections were divided, and in a large measure another's. This court decided that she could sell for herself and her children, to feed and clothe them, when necessary to sell in order to support the household,* but here that household is broken up; the mother is married, and another head, a stranger to the children, takes possession; and the home is sold, and another is bought, and title to that is not in the mother and children, but in the new husband and wife. Do not her letters of administration abate if she marry? Here there was no administration, except her administration of this year's support for herself and children, the title, the right to a support out of it, being equally in her and in them, and she holding theirs in trust for their support, and if the income support them and her, for them in fee. Do not her letters, her right to sell this property, abate? We think it would be dangerous to uphold the sale, under these circumstances, and so rule.

2. The defendant here bought fairly, paid full price. The husband and wife have land, it appears in the record, bought with his money, paid for the land of these children; they have been supported in part, perhaps, out of this land so bought; there are equities all around; and therefore, whilst we reverse the judgment for the defendant, and grant a new trial, we do so with the intimation that a bill in equity, making this husband and wife, as well as these plaintiffs, parties defendants, may adjust the equities between all concerned, so as better to subserve the ends of justice than a naked issue between the present plaintiffs and the defendant.

Judgment reversed.

* 69 Ga., 369, and citations.

Barfield, next friend, vs. Barfield.

BARFIELD, next friend, vs. BARFIELD.

1. It would require a very strong case, supported by clear and convincing proofs from witnesses entitled to credit and uninfluenced by passion or prejudice, to authorize a court of equity to wrest from the father and head of a family a homestead which has been carved out of his estate, and on which he has lived and has raised to majority all of his children, except two, at whose instance the bill is filed, and to place such homestead in the hands of a receiver. In case of insanity of the father, or such tyrannical or inhuman conduct as would lower him from the scale of manhood to that of a brute, a receiver might be appointed; but no such case is made here.
2. Equity will not, at the instance of the two minor children of the applicant, enjoin the head of a family from applying to the judge of the superior court for leave to sell all or a part of the homestead, on the ground that he drinks to excess, has married a second wife, has had his affections alienated from them, is mismanaging the estate, and threatens to so manage it as to deprive them of all benefit therefrom.
 - (a.) Nor will equity enjoin a head of a family from cutting timber from the homestead lands and so using the place as in his judgment, will best help to support the family, including the maintenance and education of the complaining minors.
 - (b.) Where a homestead was carved out of the estate of the head of a family at the instance of his first wife, and after her death he again married, the second wife became a member of his household, a participant in the homestead and the support and comforts derived therefrom, and a recipient and beneficiary of the estate while it existed,—that is, as long as the family lived within the curtilage of home and was not broken up by the death of parents and majority of children.
 - (c.) This is not the creation of a new homestead, but a question as to who is entitled to share in the enjoyment of one already existing.
 - (d.) The answer swears off any equity which might exist in the bill, and the discretion of the chancellor on questions of fact will not be controlled.

March 18, 1884.

Homestead. Husband and Wife. Parent and Child.
Injunction. Receiver. Before Judge STEWART. Henry
County. At Chambers. January 23, 1884.

Reported in the decision

Barfield, next friend, vs. Barfield.

F. D. DISMUKE; N. M. COLLENS; JOHN I. HALL, for plaintiff in error.

BOYNTON & HAMMOND, for defendant.

JACKSON, Chief Justice.

Two of the minor children of Benjamin Barfield, by an elder brother as their next friend, brought a bill in equity against their father, praying for an injunction to restrain him from cutting and selling timber off of a homestead estate set apart in the year 1869, at the instance of their mother, now deceased, and for a receiver to take charge of the homestead, that they might receive a support and education therefrom.

The complaint is that their father has married again, and is using the homestead for the benefit of said second wife and her family, and excluding from their just share of it the two minor sons, one eighteen and the other fourteen years of age. They complain that their father drinks to excess and does not send them to school as much as he ought, and is mismanaging the estate by selling off some of it, by application to the judge of the superior court to sell more, and under the influence of his present wife, or some other influence unknown to them, has become alienated from them, and has threatened so to manage the property as to deprive them of all benefit from it, and so destroy its value as not to be of service or profit to his children.

The answer denies squarely the charges of intemperance, or failure to support and school these minors, but declares that the defendant has tried to send these boys to school, and has used parental authority to constrain them to go, as far as was practicable; that the present wife is industrious, and does her full duty, and if treated with courtesy by the boys, will perform her share of the reciprocal obligations to the extent of her ability; that he has raised and educated, as well as he could, six other children, now of age and set-

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tled from the homestead, and is in like manner trying to raise and educate these; that he does require them to work, because he deems it for their good; that he has sold a little of the land for provisions for the family, including these boys, of which they got their full share of support and benefit; that the elder of the boys was allowed to cut wood and haul it with his (the father's) team for sale to the Central Railroad, and the wood so hauled and sold was worth the sum of \$110.00; and that he has applied to the judge for leave to sell some thirty-five acres more, which could be sold for twenty or twenty five dollars per acre, for reinvestment by order of the judge, as it would leave some four hundred acres of land, with timber enough to keep up the place.

The complainants respond with affidavits of their own, and perhaps one other person, to support some of their charges, but not materially varying the issues between father and sons, or strengthening the case made by the latter. On the hearing, the chancellor refused to grant the application of the father to sell the thirty-five acres, and refused to appoint a receiver and grant an injunction prohibiting his application in the future, for such sale as he may deem necessary, as well as from cutting and selling wood from the estate. To the refusal to appoint the receiver and grant the injunction the complainants excepted. To the denial of leave to sell no exception is taken by the father.

1. It would require a very strong case indeed, supported by clear and convincing proofs, from witnesses entitled to credit and uninfluenced by passion or prejudice, to authorize a court of equity to wrest from the father and head of a family the home in which for many years he had raised and sent out six adult children, and was still raising two others to the best of his ability, and place that home in the hands of a receiver, and thus break it up. It would be to destroy the homestead, to break up the household, to encourage rebellion in children against the father, and to

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defy, if not to annul, the writing by the Almighty's finger on the tablet of stone, "Honor thy father and thy mother."

In case of insanity of the father, or such tyrannical and inhuman conduct as would lower him from the scale of manhood and sink him into a brute, equity might intervene with a remedy so harsh towards the old father of a family; but the facts herein disclosed do not approach such a case. If the chancellor had granted it, and dethroned this father from the head of his table, and turned him out of the home of a protracted life, reluctant as this court always is to interfere with his discretion in granting and refusing applications for a receiver, we would instantly have reversed such an unhallowed judgment. The appointment of the receiver prayed for would have shocked the conscience of civilization, and grieved to the core the heart of Christianity.

2. To have granted the writ of injunction, though not quite so bad, would have been to encourage children to call in question the character and conduct of him who, in the providence of God, gave them being. Black are the faces, and servants of servants are the children of Ham to this day, because their progenitor mocked at the intoxication of his father and laughed at his nakedness; and sad it is to think that any descendant of those who respectfully covered up that nakedness should encourage minors in charging a parent of his and of theirs, in the courts and before all the world, with incapacity to be a father and the head of a house, because of drunkenness, upon such proof as that offered in this record.

To enjoin him from the legal right to apply to the judge of the superior court for leave to sell and reinvest a part of the homestead estate! Such an injunction is unheard of in any book of law or any court of equity upon earth. To ask the chancellor to restrain a suitor from bringing a suit and filing a petition to the judge of the superior court, that is to himself, authorized by the constitution and law of the state, and when he refused to grant the

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leave to sell and reinvest, to come to this court and assign error that the chancellor did not enjoin a man from ever, under any new facts, petitioning himself again! Verily, this is a bill brought by minors, and this prayer surely is the prattle of childhood.

But the children demand further, that the father shall cut, and authorize to be cut and sold, no more wood off of the homestead forever, at least while the homestead lasts. So that, if they cannot turn him out and put a receiver in the homestead, or prohibit their father from exercising the right of petition to the court appointed by law to pass on the question of sale of the homestead or a part of it, they beg at least to be permitted to stop him from so using the place as, in his judgment, will best help support the family, themselves included, and send them to the school which they say they love so much, but which the father says even parental authority cannot keep them at. All tends to the same end, the overthrow of parental authority and the rule of some who have left the homestead, by their influence over younger brothers left. The trouble is the second wife. The old man dared to marry again, and *hinc illæ lachrymæ*, tears of sorrow first, of anger now. Well, we think that he had the legal right to marry again; to take the second wife to his home; to seat her at the head, while he sat at the other end of the table, and to have his minor children of the homestead treat her with respect, or in the language of the old man's answer, to treat her "with courtesy."

By virtue of that marriage she became a member of his household, a participant in the homestead and its support and comforts, and a recipient and beneficiary of the estate whilst it existed; that is, as long as the family lived within the curtilage of home, and was not broken up by the death of parents and the majority of children.

It is true that this court held that, when the children were all of age and gone, and the mother died, the family was at an end, and the homestead ceased and reverted to

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the father, free of the homestead uses; and when, in such a case, the father married again, if he wished a homestead estate, he must apply for it *de novo*; but it has not held, and will not hold, that when children are yet in the family circle, and the head marries again, the second wife does not become a member of the circle and a beneficiary of the homestead as one of the family. See *Gresham vs. Johnson et al.*, 70 Ga., 631; *Hall vs. Mathews et al.*, 68 Ga., 490.

In view of the whole affair, as it appears in this record, it is too clear for serious question that the complainants have not made a case which equity will welcome into her temple of justice, and that the chancellor could have done nothing else than refuse the appointment of a receiver and the grant of an injunction.

Even if there might be equity in an effort to break up a household and dethrone its head in extreme cases, this is not one, and if, as alleged in the bill, it were such a case, or approached the neighborhood of being such an one, the answer swears it all off; the chancellor had a right to believe its statements, and this court would not interfere.

Judgment affirmed.

ROBERTS vs. THE STATE OF GEORGIA.

1. Where, on the 18th day of the month, preceding a trial of a criminal case in Lumpkin superior court, on the 23d day of the month, application was made for compulsory process to obtain the presence of a witness who was in the penitentiary and confined in Atlanta, and the same was granted, it was error for the court to refuse to order an officer to execute the process, it appearing that the testimony of the witness was material, and that the defendant, by reason of confinement in jail, had been unable to serve the process.
- (a.) The tender of money to defray the expenses of the witness was not necessary, where application was made to the court. The act of 1883, in respect to obtaining the evidence of convicts, was merely cumulative.

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2. Where the sheriff deputized a person to take charge of the jury pending the trial of a criminal case, and the appointee acted as a bailiff and had charge of the jury, without being sworn, a new trial will be granted.

February 19, 1884.

Criminal Law. Witness. Practice in Superior Court. Jury and Jurors. Before Judge ESTES. Lumpkin Superior Court. October Term, 1883.

Thomas Roberts and James M. A. Stringer were indicted for the murder of Drura W. Gaddis. The indictment also charged Roberts as a principal in the second degree. Stringer was convicted and sent to the penitentiary for life. At the time of the trial of Roberts, the present defendant, Stringer was alleged to be in the custody of one Bingham in Fulton county. Defendant was found guilty and sentenced to imprisonment for life. He moved for a new trial, which was refused, and he excepted. The substantial grounds of the motion are set out in the decision. In connection with the second division thereof, it is only necessary to state that the presiding judge certifies that the prosecutor being a bailiff, the court directed the sheriff to put another in his place, which was done, and the court supposed he was a sworn officer, but, in fact, the jury were sent out in his charge before he was sworn; that the court charged the jury specially not to speak to any one about the case, nor about anything else; and that, after this ground of the motion was made, seven of the jurors, who had not left the court room, and the bailiff were called up, and swore that, while the latter had charge of them, he said nothing to them, except that once he told them to "close up" and not to get scattered.

R. H. BAKER; M. G. BOYD; J. J. KIMSEY, for plaintiff in error.

C. ANDERSON, attorney general; W. S. ERWIN, solicitor general, for the state.

JACKSON, Chief Justice.

There are two grounds in the motion for a new trial, on which the law requires that we reverse the judgment of the court below overruling that motion.

1. The trial was set for the 23rd day of the month. On the eighteenth, application was made to the presiding judge for process, requiring the person, in whose custody one Stringer, a material witness for the defendant and a convict in the penitentiary, was kept at hard labor, to produce said Stringer, to testify on the trial, by virtue of the provision of law in section 4027 of the Code. The process or order was granted the 18th of October, but on the 24th, the day the trial occurred, the witness was not present, and the defendant made a motion for a continuance, on the ground that he had applied for and obtained an order for the witness from the judge, but that the judge refused to furnish an officer to execute it; that he had been for the last six months in jail in the county of Hall, and on October 23rd, the day before trial, in the morning, was brought to this court; that he had been unable to serve the order, and that he expected to prove by the witness that he, the defendant, was not present on the night of the killing.

This motion was refused by the court in the following language :

“Upon hearing and considering this motion for a continuance in this case, it is ordered and adjudged that the motion be, and the same is overruled and disallowed, for the reason that defendant’s counsel have shown no diligence to procure the testimony or presence of the witness, James M. A. Stringer, and for the further reason that the court told Messrs. Boyd and Baker, in conversation at White superior court, that if they desired to have Stringer’s testimony, they had better apply for the order time enough to have him there, and that he would grant them, Boyd and Baker, compulsory process, when applied for, and that said trial would not take place until the 23rd October, 1883 ”

The application for process was made five days before the day set for trial, and six days before the day of trial, and the imprisoned witness was in Atlanta, the trial at

Dahlonga, and the time ample to execute the process and have the witness present on the trial. We see no want of diligence in the counsel. It was unnecessary to obtain the order earlier. The judge at White court cautioned the counsel to be in time. They were in time. The trouble was the refusal of the court to furnish the officer to execute the process. The record furnishes no evidence of a denial that the officer was not furnished by the court to execute this process. Without the officer to execute it, it was "mere ashes on the lips"—a mere *brutum fulmen*. The uncontroverted affidavit for the continuance shows that the officer was not furnished. The motion for a new trial, in the fourth ground thereof, certified to be true by the judge, asserts the same fact. So that it is clear that the judge did not order, but refused to order an officer to execute the process to procure the presence of the witness.

Was his testimony material? He was the man who was convicted and imprisoned for life in the penitentiary for the murder of the deceased. He did the shooting. Of all men he ought to have known best whether the defendant was present when the fatal deed was done. If his testimony were, as the defendant swore it would be, and what he expected it to be, it went to the vitals of the accusation of the defendant as present, aiding and abetting the murder.

The bill of rights of this state declares that "every person charged with an offense against the laws of this state . . . shall have compulsory process to obtain the testimony of his own witnesses." Art. 1, sec. 1, par. 5 of the Constitution; Code, §4997. How can he compel the witness to attend, imprisoned in the penitentiary, without an officer of the court to execute the compulsory process, and secure the presence of the witness?

The law, under the constitution, is just as explicit. It enacts that "any judge of the superior court may issue his order to any officer having any person in his custody lawfully imprisoned, to produce such person before his court,

for the purpose of giving evidence in any criminal cause pending therein, without any formal application, or writ of *habeas corpus* for that purpose." Code, §4027.

The order was granted, but the court refused to furnish the officer to execute it; thereby the order itself had been as well refused. The reasons given by the court for not continuing the cause, on the showing made by the written affidavit of the defendant, appear to us, with the utmost respect for the integrity and ability of the judge who assigns them, insufficient in law for refusing to grant the continuance; and the refusal to furnish an officer to execute the process, made also a ground for new trial, appears to us, for the reasons given above, equally erroneous.

Nor is the suggestion of the attorney general, that the money to defray the expenses was not tendered by defendant, a more valid reason for refusing to furnish the officer. The attorney general rests that suggestion on the act of the last general assembly, providing for the production of convicts in the penitentiary to testify in behalf of defendants, which does require that expenses shall be paid by the defendant, or his poverty and inability be made known. But that act is, on its face, merely cumulative. It leaves the other remedies untouched. The section in the Code, under which the defendant proceeded, remains law, and it does not follow that, because, to pursue the gubernatorial remedy, expenses should be paid, therefore pre-existing judicial remedies are similarly burdened. They could not be so burdened. The attendance of witnesses and the process to procure it are part of the costs of the trial, and the constitution declares that "no person shall be compelled to pay costs except after conviction." Con., art. 1, sec. 1, par. 10; Code, §5002.

But even if the constitution could be violated, and the judicial remedy be made to be like the executive remedy, this record shows that this defendant is a stranger, lately removing from North Carolina, with no relative or friend in Georgia, at hard labor for his living when arrested, in

jail, and unable to pay the expenses. Nor does the court decline the compulsory process for this reason, and could not, under the oath to support that fundamental law, the constitution of the state.

2. The second ground on which the judgment must be reversed is, that the jury was placed in custody of a person not sworn in as a constable, and not under oath to keep the jury apart from intrusion and outside influence.

True, the sheriff had deputed this person to act, and by inadvertence he was not sworn; but the fact is, that he did not act under the oath of office, or any other oath touching his duties in regard to the jury, and that body, deliberating on the issue of life and death, liberty and life imprisonment, was entrusted to his unofficial care. And the fact is, that they were escorted by this "heathen man and publican," so far as law is concerned, all over the public square; and whithersoever this uncircumcised Philistine carried them, thither they went, within and without the camp. It needs neither argument nor authority to show that such a jury trial is wholly without law to support it, but the learned attorney general, with his usual candor and proper estimate of his non-partisan office, has referred us to authority which tends to support the position.

The sufficiency of the proof to support the verdict we decline to consider or adjudicate, for the reason that the new trial should be had without an intimation of our opinion on the facts and the weight of the evidence.

The other grounds of the motion we think insufficient to have authorized it; but it is granted, for the reasons and upon the grounds hereinbefore explained.

Judgment reversed.

JOHNSON vs. THE STATE OF GEORGIA.

1. Where it appeared that one accused of murder had been accosted by the brother of the deceased, and was the aggressor in a series of altercations which culminated in a deadly struggle between the two, during which the accused wrested his antagonist's pistol from him, and fired a shot or two over his head or at him, when the deceased ran up from the store of his brother to the scene of the fight, and as he approached, the accused turned the pistol upon him, and shot him down, and then turned it again upon his former antagonist, such facts should not have been left entirely unnoticed in charging upon the subject of reasonable fears, and an omission to charge concerning them will require a new trial, although the law of reasonable fears, as between man and man, was properly and clearly given. If the facts and circumstances surrounding the accused were such as to excite the fears of a reasonable man that a joint felonious assault was being made upon him, the verdict should be justifiable homicide; it should be voluntary manslaughter, if they were such only as to excite the fears of a reasonable man that some bodily harm, less than a felony, was imminent and impending; it should be murder, if the circumstances were not such as to excite the fears of a reasonable man that he was in any serious danger at all.
2. It was admissible to prove the remark of deceased, as he left the store, as a part of his act in going to the scene of the contest.
3. The dying declarations proved were admissible, as qualified and guarded by the charge; but perhaps it would have been better to have guarded more clearly the words, "whether such death was approaching fast or slow;" and the dying declarations, being merely cumulative, might be dispensed with entirely.

April 15, 1884.

Criminal law. Murder. Manslaughter. Reasonable Fears. Evidence. Dying Declarations. Before Judge BOWER. Dougherty Superior Court. October Term, 1883.

R. M. Johnson was indicted for the murder of John Cooper. On the trial, the evidence for the state was, in brief, as follows:

Joseph W. Cooper, the brother of the deceased, had had a misunderstanding with the defendant in regard to the right to sell soda water at a barbecue conducted by one Marshall Merritt, colored. Cooper claimed that Merritt had

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granted him the right to sell soda water there, and that, just as he was preparing to go, he received a note purporting to come from Merritt, stating that he had previously granted the right to defendant, and requesting him not to bring his soda fountain to the place. Cooper was very indignant at this, and expressed himself in unmeasured and indecent language. Some two or three weeks afterwards, Cooper met defendant at the store of one Shackelford in Albany. This store was located near a store kept by Cooper, and in which his brother, the deceased, clerked. A little further on was a store kept by one Ratliff. Cooper had sent defendant word to stop and see him as he went home, and defendant, for that reason, had a pistol in his pocket. Cooper showed the defendant the note, and asked if the latter wrote it. Defendant pulled it out of his hand, tore it in two, and said that he did not know whether he wrote it or not. Cooper said, "You don't know your own handwriting?" Defendant then denied it, and said that, if Cooper would go with him to the store of Ratliff, he would prove it. They started to Ratliff's, and on the way other abusive language was passed between them. Cooper testified that on the way, defendant said that he did write the note, and was "man enough to stand up to it;" that he (Cooper) said, "Any God-damned man that would forge a note on a negro is a scoundrel, and as mean as a dog, and is not honest;" that defendant said he would not stand that; that Cooper replied, "I don't care whether you do or not;" that defendant whirled round, put his hand in his pistol pocket, and pulled out his pistol; that Cooper pulled out his also; that defendant said, "You draw your pistol on me?" to which Cooper replied, "Yes, you drewed yours;" that defendant invited him to go down to the river and fight it out; that Cooper said, "Here is the place," and that they would fight it out there; that they started on again; that defendant whirled and caught Cooper with his hand; that Cooper struck defendant with his hand, kicked him, and struck him with his pistol, which

defendant grabbed and wrenched from him, and saying, "You had the advantage of me, but I have got you now," stepped back and commenced firing; and that he fired the first shot nearly straight up, and the second a little lower. The other witnesses for the state testified that the parties started from Shackelford's to Ratliff's; that Cooper stopped on the road, stooped on the ground, and said, "Here is the place to fight it out;" that he struck at defendant with the pistol, slapped and kicked him, that defendant wrenched the pistol from his hand, and began firing at him. They did not see any pistol in the hands of defendant until he took the one from Cooper. About the time of the first or second shot, the deceased, the brother of Cooper, came from the store towards the place of the difficulty, going rather in the direction of his brother than of the defendant. He said, "Joe, stop your damned foolishness, and come back in the store." Defendant turned and shot him, and then turned and fired at Cooper, his original antagonist, wounding him. Deceased was in his shirt sleeves, and no weapon was seen about him. As defendant was preparing to fire again, one Jones caught him, and one Pinson, who was a connection of defendant by marriage, persuaded him to go to Ratliff's store. Joe Cooper grabbed a pistol from the hand of a negro near by, and snapped it towards defendant. He testified that he had been drinking some, but was not drunk; that defendant was cursing him from the front of Ratliff's store when he snapped the pistol at him; that he (Cooper) did not draw a knife, and had none during the difficulty. The negro, from whom he said he obtained the pistol, testified that it was out of repair; that he had it in his hand because he heard it was against the law to carry it hidden; that he was employed by Cooper, and was crying to think he was shot; that Joe Cooper snatched the pistol from his hand near the door of Ratliff's store, and went over to Ratliff's, and snapped several times towards defendant.

When the deceased started from the store to the place of

the difficulty, he asked a person in there to remain until he came back, and said he was going to bring Joe Cooper back.

Dying declarations were shown, which were proved by a witness substantially as follows:

W. B. Bennett sworn, said: John Cooper is dead; I was with him the day before he died; he talked sensible to me Sunday morning; he said he would never get over it; he died on Monday morning, and that was Sunday morning before sun-up; I asked him how it occurred, and he told me that somebody told him that Joe Cooper and defendant were having a difficulty, and he ran out there, and told Joe to stop his damned foolishness, and come in and attend to his business, and he said he turned his side to defendant, and defendant shot him. He said defendant had fired two shots then; the third shot hit him, and the fourth shot hit Joe. He said he took no part in the fuss, only to tell Joe to stop his damned foolishness, and come into the house. He did not say what he had. He said he run out in his shirt sleeves.

The evidence for the defendant was, in brief, as follows:

Threats made by Joe Cooper were communicated to defendant, and he was told that the Coopers were very angry about the note; and he said before going to town, that he supposed the Cooper boys were going to "tackle him." His brother asked him what about. He said about some foolishness, and that there would be nothing of it; that it was about a note, and the Coopers said they were going to kick him, if he came to town that evening. He went; was met by Joe Cooper at Shackelford's store; they started to Ratliff's to settle the question as to the writing of the note. Cooper stopped on the way; said that was the place to settle it; called defendant a God-damned coward; told him he was afraid to draw his pistol, and pulled out his own, defendant having his hand in his pocket. Defendant said, "I will give up; you have got the advantage of me." Cooper slapped defendant with his pistol. Defendant

threw up his hand, grabbed the pistol, took it from Cooper, stepped back, and fired on him. The deceased, John Cooper, who was a brother of Joe Cooper, came running up with a pistol in his hand. The defendant fired upon him, and then again fired upon Joe Cooper, and ran into Ratliff's. Joe Cooper grabbed the pistol from his brother's hand as the latter fell, and snapped it at defendant as he ran into the store.

A witness for the defendant testified that the negro, who swore that the pistol last snapped at defendant was obtained from him, had previously told the witness that Joe Cooper did not get a pistol from him during the difficulty.

The note about which the controversy arose was, in fact, written by one Jordan Merritt, a son of Marshall Merritt; and he signed his father's name because he was at the head of the enterprise, and the father had told him to sign his name whenever he wanted to.

The jury found the defendant guilty of voluntary manslaughter. He moved for a new trial, on substantially the following grounds :

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the court refused to allow defendant's attorney to ask B. T. Jones, a witness for the state, whether he had not had a difficulty with Jim Johnson, a brother of defendant, and whether it made the witness have hard feelings toward defendant.

(3.) Because the court admitted in evidence, over the objection of defendant's counsel, the dying declarations of John Cooper, the deceased, the only evidence of his knowledge that he was in the "article of death" being that of W. B. Bennett (and any other evidence that there is in the brief of evidence on this subject), who testified : "I was with the deceased, John Cooper, the day before he died. He talked very sensibly to me Sunday morning. I was talking to him about being shot, and I asked him how it happened. He said he would never get over it."

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He died Monday morning, and this was between daylight and sun-up Sunday morning. I asked him how it occurred, and he told me that somebody told him that Joe and Johnson were having a difficulty out there, and he went out there when it occurred, and told Joe to stop his damned foolishness, and come in the house and attend to his business; and he said he turned his side to him, and Johnson shot him. He said Johnson had shot two shots then; and he said the third shot hit him, and the fourth shot his brother, Joe Cooper. He said he took no part in the difficulty, only he run to tell Joe to stop his damned foolishness, and come into the house. He did not make any statement as to what he heard. He said he run out in his shirt sleeves."—Objected to because not admissible under the evidence as dying declarations; and that they were illegal in going beyond "showing the cause of the death and the person who committed the act," by going into the details of the difficulty, and the evidence of Dr. Hilsman, showing he did not think he was going to die on said Sunday morning.

[Note by the court: "Approved as true, except as to the argument and conclusions of movant."]

(4.) Because the court refused to let the defendant prove by Henry Johnson, that the defendant had been put on notice by one Crawford Merritt, the morning of the difficulty, that if he came to town that day, there would be an a—se kicking; and in holding that "the witness, Henry Johnson, might be biased, and may not state it right—he may make a mistake;"—said Merritt having denied giving said notice after being put on the stand by defendant, and defendant wishing to show by the witness that he did get the information from Merritt; and the court erred in ruling, "I will reject the testimony for any purpose except to impeach the witness. I will allow it only in the way of impeachment of the witness."

[Note by the court: "Approved as true, only so far as it states that the evidence was rejected as hearsay, except

as impeaching testimony of the witness, Crawford Merritt, whose sayings were sought to be proved. The court did not hold that the witness, Henry Johnson, was biased, etc., but merely stated that evidence of this character should be rejected for reason of that character; besides the sayings of defendant showing same facts were admitted."]

(5.) Because the court refused to let defendant's counsel ask the witness, Henry Johnson, introduced by the defendant, the following question: "This conversation Mr. Walters asked you about, when you were coming on to town with Bob Johnson, state what he said about what had been told him, and about what he had heard the Coopers were going to do to him; state all that was said to you by Johnson, as to what he had heard the Coopers were going to do to him." On objection of state's counsel, because a leading and direct question, the court erred in ruling. "I think it is leading. You can ask him the whole conversation."

[Note by the court: "This ground is substantially correct, as will appear by the brief of evidence; the whole conversation was allowed to be stated, and was stated. Defendant's counsel were merely prevented from asking leading questions, and when the witness paused, they were allowed to ask what else did he say, etc."]

(6.) Because the court allowed the state to prove by the witness, H. W. Bourne, over the objection of defendant's counsel, that the same was illegal, and made out of the presence of defendant, that John Cooper said, when he was going out the store, at the time of difficulty, that "he was going out to bring Joe Cooper back."

(7.) Because the charge of the court is inapplicable to the law and facts in this case, in this: that it totally failed to refer to the right of the defendant to defend himself against the brother of Joe Cooper (to-wit: John Cooper), Joe Cooper being the one with whom the difficulty was pending when John Cooper came up. The court, instead of charging as it did on that point, as set out in said charge,

[Note by the court: "Disapproved as incorrect. It does not correctly state the connection in which the charge on the subject of juries being judges of the law was given. That portion of the charge followed immediately after the following, to-wit: 'You will be governed by the law and evidence in this case in determining which of the above stated verdicts you will find.' "]

(9.) The court erred in charging, after reading sections 4319, 4320, 4321, 4322, 4323, 4324, 4325, 4326, and from 4330 to 4335, inclusive, of the Code, as follows: "When the killing is proved to have been done by defendant, malice is presumed, etc., " as set out in the general charge below, down to and including the words "malice, may also be implied from a wanton and reckless use of deadly weapons, and a trifling with human life;" and then left that portion of his charge, and proceeded immediately to another distinct part of his charge, to-wit: "dying declarations," and charging the jury as follows on that subject: "Dying declarations are admissible in evidence when it appears that the person making them was conscious of his impending death, and when made in the article of death, whether such death was approaching slow or fast," etc., which are claimed as errors, because unwarranted by the evidence and contrary to law; and the court spoke of them as dying declarations of the deceased, and put them before the jury as *prima facie* evidence as such; and after calling the jury's attention to the "article of death," added: "Whether such death was approaching slow or fast"—stating that the court had admitted them as such dying declarations *prima facie*, there being no other evidence than that on which the court did admit them; and he failed to call the attention of the jury to the character and weight of such evidence, or what facts could be proved by such declarations, whether they were utterances consciously made in the article of death, when the hope of life was extinct, and that the sole purpose of such evidence was to prove the cause of the death and

4332, 4333, 4334, 4335. When the killing is proved to have been done by defendant, malice is presumed, and he should be found guilty of murder, unless the proof discloses such facts and circumstances as will reduce the killing from murder to manslaughter, or show it to be justifiable. It is not necessary that there should be any actual personal ill-will by defendant towards deceased to constitute the malice that would make the offense murder. Nor would every killing by one who had ill-will against the one killed amount to murder, but each case would depend upon the facts and circumstances proved under which the killing was done. Malice may be implied where no considerable provocation appears, and where all the circumstances show an abandoned and malignant heart. Malice may also be implied where it appears from the evidence that there was no necessity at the time for the killing, and the facts and circumstances were not such as to excite the fears of a reasonable man that a serious personal injury was about to be inflicted upon him, or that the person doing the killing did not really act under the influence of those fears, but in a spirit of revenge. Malice may also be implied from a wanton and reckless use of deadly weapons and a trifling with human life.

"Dying declarations are admissible in evidence when it appears that the person making them was conscious of his impending death, and where made in the article of death, whether such death was approaching slow or fast. The court, after hearing evidence upon the subject of the person's consciousness of his condition, and upon the question of approaching death, has admitted, *prima facie*, before you in this case, the dying declaration of John Cooper. It is now for you to determine first whether the evidence sufficiently showed that he was conscious of his approaching death, and that his death was really approaching, to authorize the admission of said declaration, and if not, you should disregard the dying declaration altogether; but if you think such evidence was sufficient for the introduction of such declaration under the rules, as I have given you, you should then consider such declaration as evidence in the case, together with the other evidence. * * *

"The fears of a reasonable man don't mean the fears of a coward, but of a man reasonably courageous, reasonably self-possessed.

(Read section 4331.) "The offense meant to be the subject of the fears of defendant under this section are two-fold. The one meant for your consideration in determining whether the offense is murder or manslaughter, is the offense and fear of committing a serious personal injury, not amounting to a felony, by the person killed on the person doing the killing. And the one meant for consideration in determining whether your verdict should be manslaughter or justifiable homicide, is the offense and fear of the person killed committing by violence or surprise a felony on the person doing the killing. A felony is an offense punishable by law, either by imprisonment in

the penitentiary or by death. All other offenses are misdemeanors, and not felonies.

“To illustrate: If a person were to attempt a serious personal injury upon another with his hands and without a weapon, usually this would not be a felony. On the other hand, if a person attempt to commit a serious injury upon the person of another with a weapon likely to produce death, or without such weapon, under circumstances that actually endanger the life of the other, with intent to kill, usually it would be a felony. It is important, in determining whether your verdict should be murder, manslaughter, or justifiable homicide, that you should consider and determine whether the offense the defendant acted in fear of, if any, was a felony or not. And if the evidence shows that there was an attempt to commit a serious injury on the person doing the killing, amounting to a felony or not amounting to a felony, it must also appear that the defendant really acted under the influence of those fears, and not in a spirit of revenge. And if the evidence shows that there was an attempt by the person killed to commit an injury on the person doing the killing, not amounting to a felony, and the person doing the killing did not act under the influence of any fears of such injury, but in a spirit of revenge, he would be guilty of murder. But if there was an attempt by the party killed to commit a serious injury on the person doing the killing, which did not amount to a felony, and even if defendant did not act under a fear of such offense, if the circumstances were such as to justify and arouse or excite the passion of the person doing the killing, and to exclude all idea of deliberation or malice, either expressed or implied, so that the killing was the result of that sudden violent impulse of passion, the defendant would not be justifiable, nor would he be guilty of murder, but it would be voluntary manslaughter. And further, the bare fear of either of the offenses of committing a personal injury by the person killed on the person killing, would not be sufficient to justify the killing. The facts and circumstances at the time of the killing, as shown by the evidence, must have been sufficient to have excited the fears of a reasonable man that a bodily injury, amounting to a felony, was about to be inflicted on him, to have justified the killing on the one hand; and on the other, that the circumstances were sufficient to excite the fears of a reasonable man, that a bodily injury, not amounting to a felony, was about to be inflicted on him, to reduce the killing from murder to manslaughter. It would be no excuse for the killing that the defendant acted under such fears, unless the evidence shows that the circumstances were sufficient to excite the fears of a reasonable man. There must be a reason shown by the evidence for the fears of a reasonable man. Fears without a reason, and the fears of a coward, are not the fears of a reasonable man, and are no excuse for killing. On the other hand, if the circumstances, as proved by the evidence, were sufficient to excite the fears of a reasonable man

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that a felony was about to be committed on him by the person killed, and it appears that the defendant really acted under the influence of those fears in doing the killing, and not in a spirit of revenge, he would be justifiable, whether in fact there was any real danger or not; or, if the circumstances proved were sufficient to excite the fears of a reasonable man that a bodily injury, less than a felony, was about to be inflicted on him by the person killed, and that he acted under the influence of those fears in doing the killing, and not in a spirit of revenge, the killing would be reduced from murder to manslaughter, whether the party doing the killing was in any actual danger at the time or not.

“To make a necessity for killing another in self-defence an excuse for the killing, it must be a present necessity, a necessity at the time of the killing; previous danger that had passed over, and did not exist at the time of the killing, would be no excuse. The necessity for the killing in self-defence must not be provoked and brought about by the unlawful and violent act of the party doing the killing. If one unlawfully provokes, brings about and forces an attack from another that endangers the person so provoking and bringing about such attack, such danger or necessity for killing the attacking party would be no excuse for killing him.

“In determining whether or not the circumstances were sufficient at the time of the killing to excite the fears of a reasonable man, either that a felony, or an offense less than a felony, was about to be inflicted by the party killed on the person doing the killing; or whether or not the defendant acted under the influence of those fears, or in a spirit of revenge; or whether or not there was a necessity for killing in self-defence existing at the time of the killing; or whether the circumstances were sufficient to cause a reasonable man to believe that such necessity existed; and whether defendant really, in good faith, acted under the influence of such belief in doing the killing, you will consider all the facts and circumstances given in evidence in the case; consider the position of all the parties present, who was armed and who not, the conduct of the parties at the time or before and afterwards, so far as will afford you any light; the object of the parties being present; their intentions and acts, so far as you can arrive at them from the evidence in the case. If, after a careful consideration of the evidence and law of the case, you should believe that the defendant killed John Cooper, as alleged in the bill of indictment, and at the time of the killing the circumstances were not sufficient to excite the fears of a reasonable man that John Cooper was attempting to commit a serious personal injury on defendant, and that there was no necessity for the killing to prevent such injury, but that it was done in a spirit of revenge, you should find the defendant guilty of murder.

“If you believe from the evidence that the circumstances were not

sufficient to excite the fears of a reasonable man that John Cooper was manifestly intending and endeavoring, by violence or surprise, to commit a felony on the person of defendant, but were sufficient to excite the fears of a reasonable man that John Cooper was attempting to commit a serious personal injury, not amounting to a felony, on defendant at the time of the killing, and that the defendant really acted under the influence of those fears in doing the killing, and that there was no other provocation for such killing, you should find him guilty of voluntary manslaughter."

D. H. POPE; G. J. WRIGHT, for plaintiff in error, cited on second ground, Code, §3876; on fourth ground, 18 *Ga.*, 194; on seventh ground, 18 *Ga.*, 704; on eighth ground, 56 *Ga.*, 64; 18 *Id.*, 230, 231; 40 *Id.*, 693; 41 *Id.*, 219; Code, §§4646, 5018; on tenth ground, 61 *Ga.*, 635; 58 *Id.*, 595; 67 *Id.*, 767; 12 *Id.*, 213; 68 *Id.*, 698; 14 *Id.*, 55, 66; on third and ninth grounds, *Mitchell vs. State*, (71 *Ga.*, 128); Code, §3781.

C. ANDERSON, attorney general; J. W. WALTERS, solicitor general; W. T. JONES, for the state, cited Code, §3876; 9 *Ga.*, 121; Code, §3781; 41 *Ga.*, 484; 56 *Id.*, 236; 61 *Id.*, 192; 62 *Id.*, 58; 36 *Am. R.*, 257; 26 *Id.*, 48; 41 *Ga.*, 217; 42 *Id.*, 9; 53 *Id.*, 432-3; 56 *Id.*, 61-4; Code, §§4321-2; 11 *Ga.*, 615; 3 *Kelly*, 324; 26 *Ga.*, 207; 35 *Id.*, 75, 59; 50 *Id.*, 556; 41 *Id.*, 484; Code, §4331 22 *Ga.*, 76 25 *Id.*, 527; 31 *Id.*, 167; 57 *Id.*, 184 Code, §3749; 6 *Ga.*, 276; 33 *Id.*, 268; 38 *Id.*, 508 48 *Id.*, 66; 63 *Id.*, 601; Code, §3716; 55 *Ga.*, 163 59 *Id.*, 856; 61 *Id.*, 300; 34 *Id.*, 110; 31 *Id.*, 672; 61 *Id.*, 258; 12 *Ala.*, 764; 127 *Mass.*, 455; 2 *Br. Cr. Cas.*, 93; 1 *Greenl. Ev.*, §§159, 161 *a*; 67 *Ga.*, 460 and cit.; 40 *Id.*, 693; 49 *Id.*, 485; 50 *Id.*, 560; 59 *Id.*, 232; 26 *Id.*, 192; 6 *Id.*, 348; 53 *Id.*, 368; 59 *Id.*, 63; 6 *Id.*, 276; 33 *Id.*, 4; Code, §§4320, 4336.

JACKSON, Chief Justice.

1. On a careful examination of the charge of the court, and the exceptions thereto specified in the motion for a

new trial, read in connection with the whole charge and construed therewith, we find but a single error which, in our judgment, requires the grant of a new trial. That is the omission of the court of all allusion to the rencounter of defendant with J. W. Cooper, the brother of deceased, with whom defendant was engaged when deceased ran up to the place of combat. It appears that the accused had been accosted by the brother of deceased, and was the aggressor in a series of altercations which culminated in a deadly struggle between the two, during which the accused wrested his antagonist's pistol from him, and fired a shot or two over his head or at him, when the deceased ran up from the store of his brother to the scene of the fight. As he approached, the accused turned the pistol upon him, and shot him down, and then turned it again upon his former antagonist and wounded him.

We think that the true legal question for the jury was, whether the accused was actuated by the fears of a reasonable man that, when deceased ran up to the scene of the conflict, he was armed, and came there for the purpose of joining in the *melee*, supporting his brother in the fight, and whether he really apprehended that his own life or person was thus exposed to a felonious attack, and had reasonable fears, the fears of a reasonable man, from all the circumstances that the two brothers had united, or were about to unite, in a common assault with intent to kill or maim him, and verily believed, and was authorized by the circumstances to believe, as a reasonable man, that it was necessary to shoot the deceased in order to defend himself from such joint attack. If he did so believe, and had reason so to believe, from the facts around him, then he was justifiable in shooting deceased. The doctrine of reasonable fears was properly and clearly given by the court as applicable to a contest between man and man. Precisely the same doctrine should have been given in this case, but it should have been applied to the facts of this case, where a brother ran up to the scene of a fight be-

tween his brother and another, and thus may have reasonably excited the fears of a reasonable man that he was about to be overwhelmed by the joint attack, and unless he shot, and shot quickly, life or limb would be in serious and imminent jeopardy.

We do not mean to say that the facts in the case before us make such circumstances as would excite the fears of a reasonable man that such danger threatened him. He had disarmed his first antagonist of his pistol and was shooting that. Did that antagonist have another weapon, and of what sort? Was he still in danger from that knife, if he had one, or other weapon, if he had that, or did he verily believe that he was so in danger, and were the circumstances such as to excite the fears of a reasonable man to such belief? Was the brother—the unfortunate deceased—armed, or were the circumstances such as to excite the fears of a reasonable man that he was armed? Was he approaching to take part in the contest against the accused, or was his object to induce his brother to retire and make peace? Or were the circumstances such as to excite the fears of a reasonable man that his design in running up was not peace, but war on him?

These, we think, are the points of law which would guide the jury to the true solution of this problem—to the legal verdict in this case. As they answer these questions, the verdict should be justifiable homicide, if the facts and circumstances surrounding the accused were such as to excite the fears of a reasonable man that a joint felonious assault was being made upon him; it should be voluntary manslaughter, if they were such only as to excite the fears of a reasonable man that some bodily harm, less than felony, was imminent and impending; it should be murder, if the circumstances were not such as to excite the fears of a reasonable man that he was in any serious danger at all.

Inasmuch as the law thus applicable, as we think, to the peculiar circumstances of this case was not given to the jury; as the brother who first engaged in the contest

who committed the act—that it was only admitted as a matter of necessity in the absence of higher and better evidence; and also failed to charge the jury that such evidence should be closely scrutinized, especially as to the condition of deceased's mind, and as to whether it was a partial or full statement, whether biased or unbiased.

[Note by the court: "Approved as true, only so far as it gives and states that portion of the charge given on the subject of malice and dying declarations. There was no request made to give any further explanation of the subject of malice, and it is not true that 'I, left that portion of my charge and proceeded immediately to another distinct part;' but I continued my charge as I had it written. There was no request to amplify the charge on the subject of dying declarations, and the conclusions and inferences stated in this ground, are not certified to as true."]

(10.) Because the court erred in his charge on the subject of reasonable fears, as set out in the charge below.

(11.) Because of the following charge of the court: "The evidence to warrant a conviction should be of that satisfactory and conclusive character that excludes reasonable doubt of the defendant's guilt of the offense he is found guilty of, and he is entitled to the benefit of such reasonable doubt, if such exist, in regard to the offense being murder, for the purpose of reducing it to manslaughter, and of such reasonable doubt of the offense being manslaughter to an acquittal. A reasonable doubt is such a doubt as a reasonable man would entertain after a careful consideration of a matter of important concern to himself, that prevents his coming to any satisfactory and definite conclusion in regard to the same."—Objected to because too meagre and restricted to give the jury full liberty to apply reasonable doubt to each and all the material points in the case necessary to constitute the offense charged, they being restricted as to reasonable doubt as to murder or manslaughter, and it did not apply as to whether John Cooper

John on vs. The State of Georgia.

intended to aid or assist his brother in the difficulty pending, or make a felonious attack himself on defendant; nor did it authorize the jury to exercise its right as to reasonable doubt in weighing the evidence, or in coming to the conclusion of the intention of the parties by their acts, or whether he acted under the fears of a reasonable man or not.

[Note by the court: "Approved as true only so far as it gives a copy of that portion of the charge set out in this ground. The argument and conclusions stated in this ground are not certified as true, and no request to amplify this part of the charge was given."]

(12.) Because of newly discovered evidence.

The charge of the court, omitting that part as to conflicting and impeaching testimony, the weight of evidence, and the form of the verdict was as follows:

"Under this bill of indictment, the finding of the jury can be one of several verdicts, to-wit: 1st, the general verdict of not guilty; or, 2d, the general verdict of guilty, which would mean guilty of the offense of murder; or, 3d, a verdict of guilty and recommendation by the jury of imprisonment for life as the punishment; or, 4th, you may find the defendant guilty of voluntary manslaughter.

"You will be governed by the law and evidence in this case in determining which of the above stated verdicts you will find.

"In this trial, the jury are the judges of the law and facts in the case. This does not mean that the jury can make law, or pervert or misconstrue law wilfully. They are bound by the law as it is written in the law books, and given them in charge by the court as far as given in charge. This is the means, and the only means, by which they are to learn what the law is, and after thus learning what the law is, the jury are to judge of its application to the case, and its effect, in view and in connection with the evidence in the case, keeping in view that all the law applicable to every phase of the case may not always be given in charge.

"In order to enable you to determine what verdict you will find under the law and evidence in this case, it will be necessary for you to know what is the law in the case—what in law amounts to justifiable homicide, what to murder, and what to manslaughter, and other rules of law by which you should be governed in determining your verdict. I will proceed to give you the law in charge, first by reading to you sections 4319, 4320, 4321, 4322, 4323, 4324, 4325, 4326, 4330, 4331,

Griffin et al. vs. Fleming, executor, et al.

Wills. Estates. Equity. Liens. Tax. Statute of Limitations. Before Judge RONEY. Richmond Superior Court. October Adjourned Term, 1883.

Reported in the decision.

J. H. MARTIN; FOSTER & LAMAR, for plaintiffs in error.

FRANK H. MILLER, for defendants.

BLANDFORD, Justice.

Phineas Butler died in 1858, testate, and William A. Walton, qualified as executor under his will, September 13, 1858. Testator, after giving to his wife, Harriet Butler, certain servants, with his household and kitchen furniture, and all other things of a perishable nature in and about his house, and certain bank stock, and making special provision for her in lieu of dower, or against any other claim she might legally prefer against his estate, and after providing for each one of his children as therein set forth by the 14th item, "declared it" to be his will and desire, that the lot and premises on the northeast corner of Greene and McKinnie streets, in the city and county aforesaid, then occupied by him, should be assigned to his executor thereafter named, or purchased by him, if sold at public outcry, in the division of the property and effects jointly held by the testator and his brother, Nehemiah K. Butler, provided the same could be obtained at a reasonable price, and that when so acquired, his said wife and unmarried children should be permitted to occupy the same, free of rent or other charge, during her widowhood, and at the death or marriage of his said wife, that said lot and premises should be sold by his said executor, and the proceeds thereof should be equally divided among his children and the lineal descendants of such as might be dead, "the latter to represent their parents and the shares therein of my daughters, Amanda M. Griffin, Harriet A.

Smith and Josephine D. Philpot, to be paid to their respective trustees, and held by them subject to the same uses and trusts hereinbefore declared in the several bequests to them (my said daughters)." And by the 16th item, testator declared, "it is further my will and desire" that a division of the property and effects, held jointly by testator and his brother, be made as soon as practicable after testator's death, but not with any unnecessary haste or inconvenience to his brother as surviving partner.

Further authority was given to the executor in item 17th to sell, privately or at public outcry, such parts or portions of testator's property, real or personal, as he may think expedient or necessary to execute conveniently the provisions of this will.

Thereafter, by deed dated January 1, 1860, recorded February 16th, 1863, Nehemiah K. Butler conveyed to William A. Walton, as executor of Phineas Butler, for the sum of one thousand four hundred and sixty-five dollars, his undivided one-half interest in and to the lot occupied by testator at the time of his death, the deed reciting the whole lot to have been sold at public outcry and purchased by the said executor as directed by the will of said testator.

The *habendum* clause of the deed recited it "to be held nevertheless, and disposed of by him or his successors as provided in the 14th item of the will of said Phineas Butler, deceased, to which express reference is hereby made." After such purchase, each and every one of the legatees under the will of Phineas Butler, with full knowledge of such purchase, accepted a settlement with William A. Walton, executor, of the property coming to them from the estate under the provisions of the will, leaving in the possession of the executor the said realty. He returned the same for taxation for state and county taxes from year to year as part of the estate of Phineas Butler, and made returns thereof to the ordinary's office of Richmond county down to the year 1862, when the funds in



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his hands were exhausted. Thereafter advances were made from time to time by George P. Butler at the request of said executor, who subsequently endorsed on his returns as follows: "August 21, 1875. The tax items above charged were not paid by me as executor of Phineas Butler, because I have not had, at any time since the close of the war, any productive property in my hands belonging to the estate; they have therefore been paid by Mr. George P. Butler with his own money, and under the 14th item of his father's will, they should be regarded as a charge upon the property taxed, viz.: the house and lot described in the said 14th item of the will, and paid out of the proceeds of the property when sold; they are supported by proper vouchers," signed "William A. Walton, executor of Phineas Butler, deceased."

A bill for repairs, in addition to the taxes, was approved February 15th, 1877, as appearing to be absolutely necessary to preserve the house from serious injury; and again, on the subject of painting, April 30th, 1879, the said executor stated in writing that in his opinion the dwelling house, occupied by Harriet Butler under the will, should be painted outside to preserve it, as it had not been painted for over twenty years, and must decay and deteriorate in value unless painted at once, the estimate for the work being very reasonable, closing with the statement to George P. Butler, "if you have it done, the estate should pay you the amount with interest on final division. I have no funds to do it with." And when paid, the executor approved the items as found to be supported by proper vouchers, January 24th, 1880. Again, on the 29th of March, 1881, Mr. George P. Butler in writing called the attention of the executor to the condition of the roof of the kitchen, and the estimated cost of re-shingling the same, stating that he was willing to advance it, if it met with the approval of the executor; the executor endorsed his approval in writing, and the money was advanced; subsequently, George P. Butler died June 29th, 1882; William

A. Walton, the executor, died September 2, 1882; and Harriet Butler, widow of testator, died October 21, 1882. William H. Fleming was appointed administrator *de bonis non*, with the will annexed, January 5, 1883, and pursuant to the authority contained in the 14th item of said will, proceeded to sell the property at public outcry, February 6th, 1883, when it brought the sum of seven thousand five hundred dollars. Margaret P. Butler, executrix of George P. Butler, presented to him for payment the statements and vouchers for amounts due her testator for the aforesaid expenditures for taxes and repairs, on the 24th of February, 1883.

Objections to the payment were raised by certain of the legatees interested in the fund, and thereupon the administrator, with a view of protecting himself and his securities, filed his bill for direction May 5, 1882, making parties defendant of all the legatees along with the said executrix of George P. Butler. Answers were filed by Mark B. Griffin, and the other children of Amanda M. Griffin, claiming it to be the intention of the testator to permit his widow and children, until they were married, to occupy the house and lot free of rent or other charge to his estate, but that the beneficiaries were responsible for and should be required to pay off all the taxes, insurance and like obligations imposed by either the condition of the property from wear and tear, or by the proper authorities by assessments or otherwise, expressly charging that the claims were for the most part barred by the statute of limitations, and if they were in fact not thus barred, they could not be valid and binding debts, or legal obligations of the estate. They also denied the sufficiency or validity of the papers signed by the executor to bind the estate in favor of George P. Butler. This answer was adopted by Jane M. Simmons and others. Bessie A. Bond answered, not denying the allegations or facts contained in the bill and the correctness of the exhibits; but she called for legal proof of the

same, and submitted to the court and jury the determination of her rights in the premises.

Thereafter the case came on to be heard before the judge, to whom, by consent, were referred all questions of law and fact, who decreed that the claim presented to the complainant for payment by the executrix of George P. Butler, save and except the item for building a stable and introducing water on the premises, were valid and legal charges against the estate, and were incurred with the sanction and approval of William A. Walton, executor of the will of Phineas Butler, and that the proceeds from the property now sold by the administrator *de bonis non*, with the will annexed, should be first charged with the payment of the same as part of the expenses of administration; and the said administrator was ordered to make payment accordingly.

The brief of evidence shows an agreed statement of facts, that the schedule of accounts and vouchers referred to in the bill was correct; that the premises were purchased as charged in the bill, and the estate distributed to the legatees, and by them receipted for, except the claim to a half interest in certain lands in South Carolina; that the executor had no funds of the estate in hand after January 1, 1866; that the administrator *de bonis non* had sold the property under the authority of the will alone; that Mrs. Harriet Butler occupied the premises until her death, October 21, 1882; that George P. Butler lived there with his mother, except while absent in the army, until his marriage, November 7, 1866; and that he continued to remain there until 1872, but paying board for himself and family; that all the other children of Phineas Butler were married previous to the marriage of George P.; that after January 1, 1866, Mrs. Harriet Butler had no means or ability to pay the taxes or repairs; that the property had doubled in value since 1866, not having been previously worth more than three thousand dollars.

Upon bill filed by the administrator, praying for direc-

tion as to the payment of the claim of Margaret P. Butler, executrix of George P. Butler, deceased, for taxes paid and money advanced for repairs, the court held that the claim should be paid, and decreed accordingly. To this decree several of the legatees excepted, and error is now here assigned thereon.

The plaintiff in error insists that the widow of Phineas Butler had a life estate in the house and lot purchased by the executor, under the 14th item of the will, and that, incident to this estate, the life tenant is bound to pay taxes and make repairs, and cites Code, §§252 to 254 inclusive; 29 *Ga.*, 549; 20 *Id.*, 793; 1 Wash. on Real Prop., 125-6; Code, §2255; Tiedman on Real Property, sec. 68. The authorities referred to seem to sustain his position. But we think that the will of Phineas Butler, while it may create a life estate in the widow and unmarried children of testator, yet, by the use of the words, "his wife and unmarried children be permitted to occupy the same, free of rent or other charges, during her widowhood; at the death or marriage of his wife," etc., shows that testator intended to create a *quasi* tenancy at sufferance or will; that it was thereby intended that the widow should occupy the house free of rent, and free from the payment of taxes, and freed from the duty to make repairs, the title to the property being in the executor. If this were not so, and if the widow were a life tenant, and, under the circumstances, the executor had no means with which to pay taxes and make repairs, and the life tenant was unable likewise to do so, and another person advanced money for this purpose at the instance, or by the approval, of the executor, this would constitute a charge against this estate. It is a trust estate, the title being in the executor, and would be liable to pay this claim. Code, §3377. George P. Butler, as a legatee under this will, and as such being interested in this property with his sisters, when he found the property about to be sold for taxes, there being nothing in the hands of the executor to pay with, and the life tenant

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being too poor, and unable to pay the taxes, and the premises being in a state of decay, had the right to advance money to pay the taxes and to pay for proper and needed repairs, and such advances were as much for the advantage of the other legatees as for the person making the same; and a court of equity, under these circumstances, would hold that the proceeds of this property, in the hands of the administrator, were first liable for the advances made by one legatee for the preservation of the property, in which all the legatees were equally interested. This is equity and good conscience. The property might have been sold for taxes, and may have greatly deteriorated in value by decay. The source from which the fund arose may have been destroyed but for these advances; they were a benefit to all interested; and the fund should first repay these advances, and the balance be divided as directed by this will. The taxes being *ad valorem*, and assessed against the whole value of the property, would the life tenant be liable to pay the same?

It is insisted that the claim for advances is barred by the statute of limitations. We do not think so, under the proofs, but in a case like this, a court of equity would remove the bar. See *Jordan vs. Brown, administrator of G. A. Dawson*, decided at the present term of this court, especially where it would be most inequitable and unjust to enforce it. The payment of these advances is to be made out of the fund in the hands of the administrator arising from the sale of the property, which sale could not take place until the death of the life tenant. The decree of the court below is affirmed.

Judgment affirmed.

WHITE vs. MANDEVILLE.

1. Where a distress warrant was sued out and placed in the hands of a levying officer, he was authorized and commanded to collect it, and his authority to collect the whole included authority to collect a part of the amount. A partial payment to him discharged the defendant *pro tanto*, and the plaintiff must look to the officer for the amount so paid.
 - (a.) If a defendant in a common law execution makes an affidavit of illegality, on the ground of partial payment, he must pay the amount which he admits to be due, or the levying officer will proceed to raise that amount; but in cases of distress warrants, an affidavit that the sum or some part thereof is not due is sufficient,
 - (b.) The verdict of a jury in a justice's court having failed to allow any credit for a payment by the defendant to the collecting officer of a part of the amount claimed to be due, *certiorari* was the proper remedy; and it was error to tax the costs of such a *certiorari* on the the party petitioning for it.
2. The regular day for holding a justice's court was Friday; the hearing of the case was postponed until the next day, as the defendant alleged in his petition for *certiorari*, by his consent; the answer of the justice stated that the defendant consented to postpone it until the following Monday; a traverse was filed to this portion of the answer, but was stricken by the court as immaterial:
Held, that a justice's court is one of limited jurisdiction, and has only such powers as are conferred upon it by law. It must be held at fixed times and places, and all continuances must be from term to term. A judgment rendered out of term is void.
 - (a.) If a justice continued a case contrary to law, the consent of parties thereto could not make it valid.
 - (b.) It is not decided that justices' courts may not hold a term lasting for more than one day, if the times are fixed in advance. It would seem that this might be done.

March 18, 1884.

Distress Warrant. Officers. Execution. Justice Courts.
Before Judge HARRIS. Carroll Superior Court. October
Adjourned Term, 1883.

Reported in the decision.

J L. COBB; W. F. BROWN, by CANDLER, THOMSON &
CANDLER, for plaintiff in error.

White vs. Mandeville

REESE & ADAMSON, by HARRISON & PEEPLES, for defendant.

HALL, Justice.

Mandeville sued out a distress warrant against White for rent, amounting to one hundred dollars. When the warrant was levied, White paid the levying officer sixty-six dollars, which he admitted to be due the plaintiff, and made oath that the balance distrained for was not due, and gave security for the eventual condemnation money. The issue thus made was duly returned to the justice's court, where it was tried, upon appeal, by a jury. Although there was no dispute as to the amount paid by White to the levying officer, the jury returned a verdict finding for the plaintiff one hundred dollars, with interest and cost. The defendant carried this finding, by *certiorari*, to the superior court, and upon the hearing, the writ of *certiorari* was overruled and disallowed by the judgment of the court. In this we think there was error.

1. The verdict was clearly for sixty-six dollars more than it should have been; the warrant was credited with this amount, and the credit should have been allowed. Had this been a common law execution, instead of a distress warrant, the defendant, under the 30th rule of court, Code, §1349, if he would stay the execution of the process as to the amount admitted to be due by affidavit of illegality, would have been compelled to pay it. The law in relation to distress warrants is more liberal, however, and he is allowed to file his counter-affidavit, by complying with the other provisions, where he swears that "the sum, or some part thereof," distrained for is not due. Code, §4053. The officer in charge of the warrant had full authority to collect it; this he was commanded to do. If he had authority to collect the whole, no reason occurs to us why he could not collect a part. The payment to him discharges the defendant to the extent that it goes, and

the plaintiff must look to him, and not to the defendant, for the amount.

There was no other mode of correcting this error, in the verdict of the justice's court jury, than by *certiorari*, and the defendant, for pursuing that remedy, should not be taxed with the cost of that proceeding.

2. It seems that the regular day for holding the justice's court, at which this issue was tried, was Friday, and the hearing of the case was postponed until the next day, as the defendant alleges, by his consent, but the answer of the justice sets forth that he consented to postpone it until the following Monday. This portion of the answer was traversed, and issue was found upon the cause. When it was to be heard, the court, on motion, ordered the traverse to be stricken, at the cost of defendant, because the question it raised was immaterial. Code, §4066. Whether this decision was correct or not is immaterial; the point is as to the power of the court to continue the case. If this continuance was contrary to law, the consent of parties thereto, could not validate it. 59 *Ga.*, 532; 56 *Id.*, 282. The court is one of limited jurisdiction, and has only such powers as are conferred upon it by law. The constitution declares that it shall sit "monthly at fixed times and places." Code, §5153, and the act of the general assembly of 1878, to carry into effect this provision of the constitution (Code, §4130) requires "all continuances in justices' courts to be from term to term." This judgment was rendered out of term and is void. Upon these grounds, the *certiorari* should have been sustained, and the cause certified and sent back to the justice's court, with directions to rehear the issue made, at a regular term of that court.

No question is made by the record as to the length of the terms of justices' court, and no opinion is given upon that point; possibly the terms may continue more than a single day, if the times are fixed in advance; at least, we see no reason why this may not be done. Certain it is that the act of 1858, p. 92, authorizes them to be held two

Ensign vs. Sharp.

or more days, where their business requires such prolonged terms. There is no necessary conflict between this provision and the act of 1878, embodied in Code, §4130. The act of 1858 is cited by the editor in the margin of this section, but this provision is not found in the section itself, nor elsewhere in the Code, so far as we can discover.

Judgment reversed.

ENSIGN *vs.* SHARP.

1. If one agreed to build a party wall, resting half upon his own land and half upon the land of an adjoining land owner, furnishing the material and labor therefor, and such adjoining land owner agreed that, upon its completion, he would pay one-half of the cost thereof, and should own a joint interest therein, and have the right to use it whenever he desired to build upon his own land; and as the land of the adjoining owner did not extend as far north as the wall, it was agreed that the party erecting it should convey to him the small strip of land lying northward of where his line terminated, such contract was absolute and not conditional; the covenants therein were independent, and the breach of one did not relieve from the obligation of another. Therefore, a conveyance by the party building the wall was not a condition precedent to the enforcement of his claim against the adjoining owner for his proportion of the cost thereof.
- (a.) In case of concurrent conditions, to be simultaneously performed, if one party is ready and willing, and offers to perform, and the other will not, the first is discharged from the performance of his part, and may maintain an action against the other.
2. A proceeding at law, which set out a contract such as that stated above, and sought to enforce it for the purpose of recovering one-half of the cost of building the wall, was practically as effectual as a bill for the specific execution of the contract. Under it the plaintiff obtained a judgment for money due to him, while the defendant is protected in his right to the conveyance of the land he purchased

March 18, 1884.

Contracts. Before Judge STEWART. Monroe Superior Court. February Term, 1883.

Cyrus Sharp brought suit against Charles A. Ensign,

Ensign vs Sharp.

alleging that he and defendant were adjoining land owners; that he desired to build a brick building; that prior thereto, both parties entered into a contract which, in substance, was, "that petitioner should erect the east wall of said brick building, half on petitioner's ground and half upon the ground of said Ensign, and upon the completion of the wall, said Ensign was to pay half the cost of erecting said wall, and was to own a joint interest in the same, and have the right to use the same whenever he desired to build on his land; and it was further agreed, that as the land of said Ensign did not extend as far north as the brick wall extended, your petitioner was to convey to the said Ensign the small plat of land lying between the north line of the store of Ensign and a parallel line running east, beginning at the northeast corner of said brick store, which land belongs to petitioner, and he is now, and has ever been ready to convey the same, as agreed, upon payment of the money." The declaration then alleged the amount of the indebtedness claimed under such contract, and prayed process.

Defendant pleaded the general issue.

The evidence was conflicting as to whether the contract was made with defendant or his father; whether the latter was authorized to contract, or his action was ratified, and also as to the amount of ground that was to be conveyed by plaintiff to defendant. It appeared that no deed had been tendered by the plaintiff; but a witness for him testified that the father of defendant prepared a deed for plaintiff to sign, and upon being informed that it covered more ground than was agreed, and that plaintiff would convey only the amount which he claimed was agreed upon, he said defendant would not pay unless it was signed.

The jury found for the plaintiff \$92.33, and that execution do not proceed until plaintiff should file in the clerk's office a fee simple deed to the strip of land described in his declaration. Defendant moved for a new trial on

Ensign vs. Sharp.

grounds which are sufficiently stated in the decision. The motion was overruled, and he excepted.

T. B. CABANISS ; A. D. HAMMOND, for plaintiff in error.

BERNER & TURNER, for defendant.

HALL, Justice.

The plaintiff's declaration sets forth an absolute and not a conditional contract, and avers part performance, with a tender of full performance, on his part.

There is no dispute that the plaintiff furnished the material and built the wall in question ; the only controversy was as to the quantity of land the plaintiff agreed to convey to the defendant in connection with one-half of the wall. This question was plainly submitted to the jury, and they found in favor of the plaintiff's version. On the question in issue, the testimony was in distressing conflict. There was evidence enough to sustain the verdict, and the court did not err in refusing to set it aside and grant a new trial ; at least, there was no abuse of discretion in refusing the new trial. The contract, as set forth in the plaintiff's declaration, and as substantially proved by his witnesses on the trial, was, that plaintiff should erect the east wall of his building, one-half on his own and the other half on defendant's land, and upon the completion of the same, defendant was to pay one-half the cost thereof, and was to own a joint interest therein with plaintiff, and have the right to use it whenever he desired to build on his land ; and as the land of defendant did not extend as far north as the wall did, that plaintiff should convey to him the small plat of ground lying between the north line of his store, and a parallel line running east, beginning at the northeast corner of plaintiff's brick store, which plat of land then belonged to plaintiff. The court instructed the jury, that if the contract was that the plaintiff was to build a wall half on defendant's land, and was to furnish the ma-

terial and labor, and if the defendant was to pay for one-half of the same, and plaintiff was to convey one-half of the land on which the wall is situated, together with any other number of feet in the rear of defendant's building, as far back as the brick wall ran, or farther, as they might believe from the evidence, then they would be authorized to return a verdict for the plaintiff for one-half the amount the wall cost, and that the execution, which should issue on the judgment, should be stayed until the plaintiff should file in the clerk's office of the court a fee simple deed conveying one-half the wall, and such other number of feet in the rear of defendant's store as they might find from the evidence was agreed by the parties to be conveyed, and refused to charge at the request of defendant's counsel:

(1.) That this was a suit at law, on the idea of the full performance of a contract, and therefore the burden is on the plaintiff to show that whatever the contract required him to perform was done, in order to entitle him to recover.

(2.) That if the contract required a deed from plaintiff to defendant, whether it was for five feet or more, the burden was on plaintiff to show a compliance with this part of the contract before he was entitled to recover; that this depended upon the evidence of which they were to judge; that it must be shown affirmatively that a compliance with this portion of the contract, as to the title, was performed by the plaintiff before he could maintain his suit at law.

If these requests contained correct propositions, instead of requiring them to be given in charge to the jury, they should have been taken advantage of by a motion to nonsuit the plaintiff's action at the close of his testimony, or a demurrer to the declaration should have been insisted upon before this stage of the trial had been reached. The defendant did neither, but relied on his plea of the general issue, filed to the suit. It was manifest from the plaintiff's declaration, that he had not made out and tendered the conveyance, before instituting his suit, while he avowed

his readiness to do so when he received pay for the work done and material furnished, and the evidence, as we have seen, was to the same effect. It is true that it appeared that the plaintiff refused to execute to defendant a deed for a larger quantity of land than he claimed he was bound to convey by the terms of the contract between them, but offered at that time, and before the commencement of his suit, to convey the quantity he alleged he had agreed to convey.

1. We do not think this conveyance was a condition precedent, but was rather a condition concurrent with others, which made up the entire contract. As before intimated, this was an absolute and not a conditional contract, and every covenant therein was independent of others, and the breach of one did not relieve from the obligation of another. Code, §2721, and citations thereunder. In *Biggers vs. Pace*, 5 Ga., 171, 175, this court held that where, by the understanding of the parties to a contract, the conditions were concurrent, and one was ready and willing and offered to perform, and the other was not, the first was discharged from the performance of his part, and might maintain an action against the other. Lumpkin J., said in this case: "The delivery of the corn and the payment of the money were to be done at the same time. They were concurrent conditions to be simultaneously performed. And the doctrine is, that if one party is ready and willing, and offers to perform, and the other will not, the first is discharged from the performance of his part, and may maintain an action against the other. *Goodison vs. Nunn*, 4 T. R., 761; *Jones vs. Buckley*, Doug., 684." Here the plaintiff had furnished the labor and material, and erected the wall, and was ready and willing and offered to convey to the defendant so much of the land as he understood by the terms of the contract he was bound to convey, which the jury have found was the quantity agreed to be conveyed, but the defendant would not pay what he admits he was to pay of the cost of the erection, unless

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the plaintiff would convey a larger quantity of land than the finding of the jury shows he was entitled to.

2. For all practical purposes, this proceeding, on the part of the plaintiff, was as effectual as would have been a bill for the specific execution of the contract. Under the power to mould verdicts at law, Code, §§3562, 3032, the plaintiff has a judgment for the money due to him, while the defendant is protected in his right to the conveyance for the land he purchased. In this view, what does it matter, whether this conveyance was a condition precedent, or whether it was concurrent with other conditions of the contract? The result of the trial is such as it should have been; there was no error in the charge of the court, or in his refusal to charge as requested.

Judgment affirmed.

ANDERSON, administrator, vs. BROWN.

[Hall, Justice, being disqualified, Judge Clarke, of the Pataula circuit, was designated to preside in his stead.]

1. The verdict is sustained by the evidence.
2. The title to property set aside to a bankrupt as an exemption is absolutely in him, and there is no law prohibiting him from alienating or encumbering such exempted property, though done before his final discharge.
- (a.) Where articles of agreement set forth mutual covenants, they constituted a valuable consideration from each party to the other. In this case the articles contemporaneous with the note, deed and bond for titles, constitute with them one contract. They must all be construed together, and the consideration of the main transaction runs through all the branches.
- (b.) The true test of testamentary character in a writing is, whether its effect appears to be deferred till the death of the maker and appointed to take place in that event.
3. While parol testimony is inadmissible to alter the terms and conditions of a written contract, it is admissible to show the circumstances under which a note was made, to explain the consideration and show that it was not, in fact, based on the consideration which appeared upon its face, but what its true consideration was.
4. In a contest between an administrator and another concerning cer-

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tain lands, tax returns made by the intestate of the administrator, in which he returned the lands as the property of the other party, were admissible in evidence as admissions against his title.

5. A policy of insurance issued to the intestate, insuring the improvements on the land as his property, was properly rejected from evidence. The policy was the statement of the company, not of the insured, and it was irrelevant as a contradiction of the admissions of the intestate, because he still had an insurable interest in the property.
6. Under a bill by an administrator to recover certain land conveyed by his intestate, the existence of judgments and claims against the estate and the insolvency of the decedent being admitted, it was irrelevant to go into a full exhibition of the liabilities of the estate.
- (a.) A grantor cannot plead against his conveyance to his grantee and the possession of the latter his own fraud, nor can an administrator plead his intestate's fraud for that purpose.
7. One ground on which it was sought to set aside certain articles of agreement being the imbecility and incapacity of a party thereto, and his administrator, who brought the action after his death, having testified at length to establish that the decedant had always been a man greatly deficient in business sense and force, and that for many years prior to his trade with defendant he had been incompetent to make trades, it was admissible to show, on cross-examination, that the witness himself had traded with the decedent in regard to interests amounting to \$10,000.00, although it was five years prior to the making of the contract in controversy. In such cases the inquiry is not usually confined to precise and narrow limits of time.
8. Where a witness has been examined by interrogatories, a party may withdraw his cross-interrogatories and then object to the use of answers thereto by the other side, if they are objectionable, as coming from the offering side, provided that such withdrawal is made before the interrogatories are read to the jury; but upon an oral examination, a party asking a cross question and eliciting an unfavorable reply, which the other side could not have introduced, cannot have the legitimate answer to his own question ruled out; and the same principle applies to cross-interrogatories and answers after they have been read to the jury.

April 8, 1884.

Bankruptcy. Debtor and Creditor. Insolvency. Contracts. Evidence. Deeds. Wills. Admissions. Administrators and Executors. Estoppel. Fraud. Practice in Supreme Court. Practice in Superior Court. Be-

Anderson, administrator, vs. Brown

fore Judge SIMMONS. Houston Superior Court. October Term, 1883.

Reported in the decision.

A. A. DOZIER; R. N. HOLTZOLAW; H. M. HOLTZOLAW, for plaintiff in error.

B. M. DAVIS; W. S. WALLACE, for defendant.

CLARKE JUDGE.

On May 29, 1877, the following transaction occurred between the intestate of plaintiff in error and the defendant in error.

Intestate executed to said defendant his promissory note for \$723.00, due December 1, thereafter. For security thereto, he made to the same a fee simple warranty deed to certain lands, and received back from him a bond to reconvey in payment of the note. Contemporaneously, they joined in a written agreement under their seals, and attested by two witnesses, wherein "the said Glenmore T. Brown agrees, covenants and contracts with said Tooke, that, if said Tooke should fail, during his life, to pay" said note, the said Brown "shall not, during the life of Susan Tooke, the wife of said Joseph, if she shall survive said Joseph, so press said claim, or note, as to deprive the said Susan of the full enjoyment, for her natural life, of the use and enjoyment of said lands." The said intestate therein covenants and agrees, for himself, his heirs, executors and administrators and assigns that, in the event said Brown carries out his covenant aforesaid, "then" the said Tooke "surrenders up to said Brown his bond for titles to said land and all right to pay for the same, and to have title thereto made as specified in said bond; but that said lands, after the death of said Susan, shall revert and become absolutely vested in said Brown, his heirs and assigns." In January, 1880, about the first day, Tooke

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put Brown into possession of the land. On March 22, 1880, Brown executed a note of which here follows a copy, to-wit

“On the first day of October next, I promise to pay Joseph Tooke, landlord, or bearer, four thousand pounds low middling lint cotton, for the rent of his farm upon which he is now residing. March 22d, 1880.
G. T. BROWN.”

On the back of the note was at the same time entered:

“I this day transfer the within rent note to John G. Brown, as collateral to our promissory note for three hundred and twenty-six $\frac{1}{10}$ dollars. March 22, 1880.
JOSEPH TOOKE.”

The note was then delivered to John G. Brown from whom it was, at the trial, obtained by *subpœna duces tecum*. Joseph died in April, 1880, and Mrs. Tooke about four months after. In March, 1881, plaintiff in error qualified as administrator. In September following, he filed his bill against Glenmore T. Brown, making the following charges, to-wit: That said deed, bond for titles and Tooke's note were made as aforesaid; that Brown rented the land for 1880 from Tooke, giving therefor his note above copied, on an agreement that the amount of such rent should be credited on Tooke's said debt to Brown; that Brown, without express contract, had held possession of the lands for 1881 and owed a like amount for rent of that year also; that he was indebted to the estate for certain personalty on the place at Tooke's death, and appropriated by Brown, making up more than enough to settle up Tooke's note. The bill prays for an accounting, and that the defendant may be required to execute to complainant, as administrator a reconveyance according to the terms of the said bond.

Defendant answered, setting up said articles of agreement, and compliance with his covenant therein. He denies that he took possession of said lands as Tooke's tenant, under a contract for rent, but charges that said Tooke induced him to take immediate possession of the land as his own, under the deed, and in consideration therefor to make

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provision for the support of Tooke and wife during life; that Tooke, being old and infirm and unable to carry on the farm, did, for his own comfort and that of his wife, urge upon defendant this arrangement. He alleges that his note, purporting to have been given for rent, was really given to enable Tooke, by its transfer, to raise a sum in cash to meet certain emergencies of bad health, for medical attention, etc., and was, as soon as executed, transferred to John G. Brown, who advanced the needed money on it for such purposes. He says that he not only forebore to press his claim during the life-time of Mrs. Tooke and of Joseph Tooke, but that they lived on it under his care, and that he, by Tooke's request, and supported them from the time he took possession as long as they lived. He admits receiving some of the personalty, but alleges cash payment therefor. He denies that anything has ever been paid on Tooke's note, and that respondent owes anything to the estate for rent. He claims that since the death of Mrs. Tooke, he has held the lands as his own absolute property, under said deed, articles of agreement and compliance aforesaid, by virtue whereof he insists that the title did, at her death, become absolute in him.

By amendment, the complainant charged that said articles of agreement were void, on various grounds hereinafter particularly set forth, and also because of the mental imbecility or incapacity of his intestate. All these issues of fact were submitted to the jury, a verdict was rendered for the defendant, a motion for new trial was made and overruled, and the refusal of said motion is assigned as error.

1. The first and second grounds of the motion for a new trial are an impeachment of the finding of the jury, as "contrary to the evidence and the principles of justice and equity," and as "decidedly and strongly against the weight of evidence." There certainly was enough evidence in favor of the finding to sustain the verdict.

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2, 3. Complainant objected to the said articles of agreement as evidence, on the following grounds :

(1.) Because these lands had been set aside as an exemption in bankruptcy to Joseph Tooke, who had not been discharged, and this was an attempt to alienate or encumber them, and void.

(2.) Because it was a conveyance of an insolvent at the time to respondent, reserving a benefit and possession to himself, the grantor, and is void.

(3.) Because it purports to convey a future interest in lands, and not to operate to transfer title immediately, and is not good as a deed.

(4.) Because it purports to convey a future interest in lands, and not to operate to transfer the title until after the death, not only of the grantor, but of his wife also, and is therefore testamentary, and not properly witnessed, and is void.

(5.) Because, being a testamentary paper, not properly witnessed or probated, it cannot be admitted in evidence.

(6.) Because there is no warranty in the agreement, no conditions on either party which are compulsory, is a *nudum pactum*, works no forfeiture, and is void.

Over all this array of objections, the court admitted the articles in evidence, and that ruling is the 3d ground assumed in the motion for new trial.

It appears in the record, as a solemn admission by defendant, that Tooke had been adjudicated a bankrupt; that these lands had been assigned to him as exempt; and that he had not been discharged, but that the proceedings in bankruptcy were still pending at the execution of the contract in question. But there is no law prohibiting a bankrupt from alienating or encumbering his exempted property. The title to it is absolutely in himself.

While the insolvency of Tooke sufficiently appears, we know of no law which prevents an insolvent from conveying away, in good faith, his land exempted in bankruptcy, as a security for a debt, openly reserving, by bond for

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titles, a right to redeem on payment of the debt. We know no law which prohibits him from selling, in good faith, the remainder, after a life estate to himself and wife, so as to bind himself.

The former is what he did by his deed of conveyance, and by taking Brown's bond for titles. Perhaps the latter is one mode of stating the effect of the articles of agreement. The administrator could not set up this objection to the acts of his intestate. These articles, contemporaneous with the note and deed of Tooke and Brown's bond for titles, constitute, with them, one contract, and they must all be construed together. The consideration of the main transaction runs through all the branches. The articles of agreement set forth mutual covenants, which constitute a valuable consideration from each to the other.

It is said that the agreement purports "to convey a future interest in lands, and not to operate to transfer title immediately," and that it is therefore void. On the question of the admissibility of the paper in evidence, it matters not whether it be called a deed of conveyance, or a contract providing terms, under which a title, otherwise conveyed, could be relieved from conditions of defeasance. It was a part of the written contract of the parties about this land, out of which and according to which they hold their respective rights. We can see no force in the objection number 3, unless we take it to be an incomplete statement of the idea contained in the 4th and 5th objections, which set up that the contract expressed in the articles was not to take effect till the death of Tooke, and that the agreement was therefore testamentary in its character, and, for want of due attestation as a will, altogether void.

The true test of testamentary character in a writing is, whether its effect appears to be deferred till the death of the maker, and appointed to take place upon that event.

The true construction of the entire contract witnessed by these papers is this: the deed conveyed the fee simple

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title, *eo instanti*, but Brown then and there assumed an obligation to re-convey upon a condition expressed. By the articles of agreement, an additional immediate effect took place, viz.: that Brown's obligation to re-convey was then and there so modified that he might relieve himself from it by patiently and forbearingly allowing Mrs. Tooke to enjoy the use of the land during her life, long or short; to which forbearance he then and there bound himself by a solemn, sealed covenant. These rights and liabilities were all fixed at once by the execution of the contract in all its several parts. It is true, that one of its conditions might have to be performed after Tooke's death. But it might not. Brown's covenant was to forbear during Mrs. Tooke's life. Had she died before her husband, and had Brown forborne till her death, he would have been free to proceed against Mr. Tooke, without losing the benefit of Tooke's covenant expressed in these articles. The articles, therefore, are not testamentary in their nature. They were properly admitted in evidence.

4. John G. Brown testified as follows in regard to the aforesaid note of Brown to Tooke: "I wrote it. The note was written by me in March, I think. Mr. Tooke had heard of a cancer doctor in Macon, and wanted to raise money to go there. He went to work on Sonny (*i. e.*, Glenmore Brown) to raise it. The boy came to me, and I told him I would not raise it, unless he would fix me up some way to secure me in the payment. I says, I don't care, so you give me good collateral. He went off and came back again. Tooke did not know what to do. I says, get him to give you a rent note. I think it was about \$400 he wanted, and he made that note for \$500 to secure the amount. Glenmore Brown made the rent note. I think it was some seven or eight bales of cotton; and his grandfather, Joseph Tooke, signed the transfer, and I got the money and let Tooke have it. I took the note from Glenmore Brown, and it has been in my possession ever since."

To this testimony complainant objected, on the ground that it was parol testimony to contradict the written note. The admitting of it by the court constitutes the 4th ground of the motion for new trial. We see in it nothing to contradict or vary the terms or conditions expressed in the note, or to add any new terms or conditions. It is no effort to get rid of any promise made, either as to the extent or time of fulfillment. It is but a detailed statement of the circumstances under which the note was made. If it explains the consideration and tends to show that it was not, in fact, a note based on rent, we understand that it is allowable to show by parol the true consideration of a note, so long as there is no effort to graft on to the writing any new condition or stipulation, or to strike therefrom any stipulation or condition therein expressed.

5. Certain tax returns made by Tooke, as agent for defendant, Brown, in 1877 and 1878 and 1879, wherein he returned these lands as Brown's property, were allowed to go to the jury as admissions of said Tooke. This is the 5th ground for new trial. The admissibility of such admissions of intestate against his own title, when offered in answer to the claims of the administrator, is too plain to need more than a statement.

6. In rebuttal, complainant offered a policy of insurance, made to Tooke December 10, 1879, upon improvements on these lands. On objection, the court excluded it, and this furnishes the 6th ground in the motion for new trial. The policy was not offered with the application of Tooke or any statement of his. It is the statement of the company. The policy is not set forth in the record, so that this court can judge with certainty of its nature and bearings. We could not, without more accurate knowledge of it, hold that the court below, where it was fully known, erred in excluding it. It is also irrelevant as a contradiction to the admissions by Tooke against his interest, because he had an insurable interest, notwithstanding the contract set up by Brown. Brown's title had not then.

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become final and absolute. The acceptance of a policy of insurance on the improvements could not avail as an assertion of title adverse to that set up for that time by defendant.

7. The 7th ground of the motion for a new trial is founded upon these facts: Complainant offered to prove that there were, at the time of the trial, debts against the estate, and the particular description of them. It appears that he was allowed to testify, and did testify, to the existence of judgments against Joseph Tooke, antedating the trade between him and Brown, and that there was an account for burial expenses and a doctor's bill. It was admitted that some of the old judgment were levied on these lands, and that proceedings were pending for their enforcement. The insolvency of Tooke was a proved and undisputed fact. But it seems that complainant was not allowed to prove fully and particularly the indebtedness of the estate. For whatever the fact of such indebtedness and of such insolvency could be worth, complainant, as administrator, had the full benefit of such facts. Surely, it could not be relevant to this case to go into a full exhibition of the condition and liabilities of the estate. It is contended that, upon showing debts which ought to be paid, the administrator would be allowed, in behalf of creditors, to attack his intestate's deed and agreement aforesaid, on the ground that they constituted a fraud against creditors. Well, if he could be allowed to plead his intestate's fraud, he had in enough proof of the existence of creditors to lay the foundation for a claim of such right. But it is a fundamental principle that Tooke, if alive, could not be allowed to plead against his conveyance to Brown, and Brown's possession thereunder, his own fraud; and it is equally well settled that the administrator cannot plead his intestate's fraud for such a purpose.

8. The eighth ground for new trial is, "Because the court, over objection of complainant, allowed respondent to prove that complainant, as an individual, made a con-

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tract with Tooke five years before Brown's trade, and what interest complainant had in the factory: also all evidence of what property complainant, or his wife, got from Tooke, as complainant insisted not to disclose his and his wife's private affairs."

Complainant had testified at length to establish that Tooke had always been a man greatly deficient in business sense and force, and that for many years prior to his trade with Brown, he had been incompetent to make trades. In cross-examination, he was asked, "Didn't you trade your property to Mr. Tooke for \$10,000 interest in the factory?" He replied, "I made a trade with him, but it was five years before Glenmore's trade with him." The court allowed this evidence. We think it was relevant, as tending to show the complainant's estimate of Tooke's mental capacity at that time. On questions like this, the inquiry is not usually confined to precise or narrow limits of time. Mrs. Anderson had testified, in behalf of complainant, to much going to show the feebleness of Tooke's mind for years before the trade with defendant, Brown. If any other evidence of the kind objected to in this ground of the motion was admitted, the same is not so specifically set out in the motion for new trial, or in the record, as to enable this court to see the force of the objection.

3 The 9th ground for the new trial asked is the failure of the court to charge the law contrary to the propositions which we have hereinbefore decided in regard to the said articles of agreement. Of course, we see no error in that.

Jeter was examined upon interrogatories by defendant. Complainant, in his 7th cross-interrogatory, and in his 8th, directly asked Jeter what he had heard defendant say about the contract of rent between him and Tooke. Jeter made direct answers, setting forth defendant's statements favorable to himself. The 10th and 11th grounds of the motion for a new trial are, that the court did not, on the application of complainant, exclude from the jury these statements of defendant, so elicited. It is well settled that a

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party may withdraw his cross-interrogatory, and then object to the use by the other side of answers thereto, if they are objectionable as coming from the offering side. But it is also settled that, upon an oral examination, a party asking a cross-question and eliciting an unfavorable reply, which the other side could not have gotten in, cannot have ruled out the legitimate answer to his own question. How can this rule be reconciled in principle with the allowance of the withdrawal of a cross-interrogatory, and of objection to the answer? Obviously thus: 'Before the interrogatories are read to the jury, the withdrawal of a question is, so far as the minds of the jury are to be affected, the same as if the question had never been asked. But on oral examination, the jury hear the cross question and the answer, and it is trifling with the means of investigation before the court to draw out and place before the jury matter which may, despite all judicial precautions, affect the finding, and then call on the court to protect the rash inquirer from his own indiscretion. This principle applies with full force to cross-interrogatories and answers, which have been read to the jury without objection. It is too late for the author of the questions to move to rule out such answers. In the argument, counsel for plaintiff in error contended that they asked to withdraw these cross-interrogatories before they were read. If they did, they have failed to make that fact distinctly to appear. The presumption being in favor of the ruling below, it seems proper, under the mode of stating this objection in the record, to believe that the motion to exclude this testimony was never made till the depositions had been read to the jury.

On the whole, we see no ground to reverse the court below. Let the judgment be affirmed.

Judgment affirmed.

BARCLAY *et al.* vs. KIMSEY *et al.*

1. As to the granting of letters of administration, a court of ordinary is a court of general jurisdiction, and its judgments are not void because the proceedings upon their face do not show all the prerequisites of petition, publication, giving bond and the like. Nor is such a judgment of a court of general jurisdiction void because its proceedings fail to conform to the rules of practice prescribed by law for the transaction of its business. Such failures are irregularities, and cannot be objected to except in the court giving the judgment, and on a proceeding for that purpose; and the presumptions attaching to the judgments of any other court of general jurisdiction are applicable to such judgments of the court of ordinary.
 - (a.) This case differs from those in 67 *Ga.*, 227 *et seq.*; 9 *Id.*, 135; 12 *Id.*, 526.
 - (b.) It cannot be inferred that the bond required by law was not given, because it is not recited in the order appointing an administrator; nor can the judgment be collaterally attacked by evidence going to show a non-compliance with the law in this respect.
 - (c.) When the time prescribed by law for such publication had not elapsed before the first day of the regular term of the court of ordinary, and the court was adjourned to another day, and the publication having been completed, letters of administration were granted, such judgment was irregular, but not void, and could not be collaterally attacked.
 - (d.) If administration were granted out of term, and such fact were made to appear, the judgment would be void; but courts of ordinary have power to grant letters of administration at an adjourned term thereof.
 - (e.) Where administration was granted in 1867, and no direct attack ever made thereon, nor any collateral attack until 1883, and during the intervening time important rights vested under the administration in innocent parties, it would require a clear and strong case to justify a court of equity in overturning it—a case of fraud actual and intentional upon the part of the claimants of right under it.
2. Equity has concurrent jurisdiction with courts of ordinary over the settlement of accounts of administrators.
 - (a.) Irregularities in the stating part of a bill or its prayer, or in the decree founded thereon, although grave, will not render the proceeding void, at least as to persons acquiring rights thereunder *bona fide*.
 - (b.) An administratrix having been a party to a bill, and consented to a decree thereunder, the distributees of the estate, whether minors, married women or adults, are represented by her, and in

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the absence of collusion between her and the other parties, are bound by the decree.

- (c.) The administratrix being a party to the bill, and having been appointed guardian *ad litem* for the minors, and not declining to act for them in that capacity, no order making them parties by such guardian was necessary in order to bind them.
- (d.) Where a decree has remained undisturbed for eleven years, and parties now complaining of it have received benefits under it, which they could not otherwise have obtained, and parties could not well be placed in *statu quo*, this court will be slow to upturn such a decree for mere irregularities. Such is the policy of the law.
3. There is no error in any of the rulings and charges of the court complained of.

May 13, 1884.

Administrators and Executors. Judgments. Courts. Ordinary. Equity. Before Judge SIMMONS. Habersham Superior Court. September Term 1883.

Reported in the decision.

EMORY SPEER W. I. PIKE; W. T. CRANE, for plaintiffs in error.

C. H. SUTTON; POPE BARROW, for defendants.

HALL, Justice.

This was an action in the statutory form for the recovery of real estate and *mesne* profits, brought by the children of John R. Stanford, deceased, who, together with his widow, were his heirs at law. An abstract of his title was attached to the declaration, and on the trial, which took place at September term, 1883, of Habersham superior court, the plaintiffs showed their relationship to the deceased, as set forth in their pleading; that he was in possession of the premises in question, and had title thereto at the time of his death.

The defendants, in reply, insisted that Stanford, at the time of his death, was greatly involved in debt; that his

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estate was insolvent, was incumbered by mortgages to a very large amount, in favor of Hyatt, McBurney & Co. and Wiley, Banks & Co.; that these mortgages were in existence at, and prior to, the close of the late war; that he, in his lifetime, had sold and conveyed most of his lands, including that in dispute, to one Bradford, subject to the mortgages aforesaid; that his estate had been administered by his widow, who had been appointed to that office by the proper court; that she had never been discharged from the administration, and was still acting in that capacity; that, as such administratrix, she had brought suit on the equity side of the court, and had procured in said suit a decree cancelling the sale and conveyance of the lands by her intestate to said Bradford; that consequent upon the decree, a receiver was appointed to take charge and dispose of the property thus recovered, under the direction of the court of chancery; that Hyatt, McBurney & Co., having foreclosed their mortgage by a decree in a suit instituted by them in the circuit court of the United States for the northern district of Georgia, brought a suit on the equity side of the superior court of Habersham county, against the receiver having charge of the estate of their debtor, against the administratrix upon his estate, and the attorneys and others claiming liens upon the same for services rendered in restoring the property conveyed to Bradford to the estate, as well as against Bradford, who claimed a lien on account of payments he had made in carrying out his contract with Stanford, and which, after his death, had been cancelled. To this bill a demurrer was filed, which was sustained. Exceptions were taken, and that decision was carried to the Supreme Court by writ of error. After reaching the Supreme Court, the case was withdrawn by consent of all parties, for the purpose of having the judgment sustaining the demurrer set aside, and the case re-instated on the docket of the superior court, as it was prior to the hearing of and judgment on the demurrer. When the case was restored to that court, this

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agreement was carried into effect. Wiley, Banks & Co., who held the superior lien upon the land, were made parties to the proceeding. The widow of Stanford, who was already a party to the bill, both in her individual right and in her representative character, was appointed guardian *ad litem* for the minor children, who were thus, and only thus, likewise made parties. No other changes were made in the statements and charges contained in the bill which sought to restrain the sale of any property by the receiver, and attacked the charges upon the estate on account of the liens and claims arising thereon subsequent to intestate's death, the widow's claim of dower, and the claim on behalf of the family to homestead and exemption, and prayed the satisfaction of complainant's debt, and for general relief. The various parties to the suit then agreed upon a decree, and in pursuance of that agreement, a verdict was taken, making provision for an exemption and homestead for intestate's family, also for the payment of Bradford's claim, and directing a distribution of the estate in kind between these parties and the various creditors in the manner prescribed therein. The defendants in the present action claim under the party to whom the land in dispute was assigned by this decree. When the decree was offered in evidence, together with the proceedings on which it is found, the plaintiffs objected thereto, upon the following grounds:

First. Because the decree conveyed no title out of Stanford's estate and cannot operate as title to defendants.

Second. Because the decree did not bind plaintiffs, they not being parties to the bill.

Third. Because the pleadings in the bill filed by McBurney & Company and Wiley, Banks & Company did not authorize such a decree, there being no prayer for such, and no allegation relative thereto.

Fourth. Because the court could not render such a decree, dividing out the lands in parcels, without any price being fixed thereon.

Fifth. Because the decree is void, for the reason that the bill, before said decree was rendered, had been carried to the Supreme Court upon a writ of error sued out by the complainants from a decision rendered by Judge Davis, and withdrawn from the Supreme Court by the parties to the bill, and re-instated in Habersham superior court for final settlement, as appears from the records tendered in evidence.

Sixth. Because the decree is void, on the ground that the court had no jurisdiction of either of the parties or the subject-matter

Seventh. Because the decree did not bind the plaintiffs, they not having been parties to the bill, nor having had any knowledge of the case being in court until long after said decree was rendered.

Eighth. Because, after the death of John R. Stanford, the title to his real estate vested in his heirs at law, these plaintiffs, and could not be divested, except by regular sale as prescribed by law.

Ninth. Because the decree did not bind these plaintiffs, they not being parties thereto; neither can it be received as evidence against them in this case.

Tenth. The decree is void because the court transcended its authority in making it.

Eleventh. Because the defendants cannot go into a court of equity to exhaust the estate of John R. Stanford until after judgment and a return of *nulla bona* thereon to the execution.

Twelfth. The decree is void because Mrs. Stanford is not lawfully appointed administratrix on the estate of the deceased.

The decree and bill were admitted over these objections, as was also the defendants' deed made thereunder, and the plaintiffs excepted

The plaintiffs also attacked the administration upon the estate of the intestate, and offered in evidence the record of the court of ordinary to show that Mrs. Stanford

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had not been appointed an administratrix, the minutes showing she had been appointed at an adjourned term of said court, and also showing the court had been adjourned to November 11th, 1867, on which day she was appointed.

The minutes were objected to by defendants' counsel, and objection sustained.

The evidence offered is as follows: A certified copy from the minutes of the court of ordinary of Habersham county, as follows:

"Minutes Court Ordinary, November Term, 1867—Present W. S. Erwin, Ordinary.

"Ordered that this court be adjourned until Monday the 11th day of November, 1867. W. S. ERWIN, Ordinary."

"Minutes Court, Ordinary Adjourned Term, November 11, 1867.

Whereas, Mrs. Cordelia S. L. St. Stanford, having hitherto made application to this court for letters of administration on the estate of John R. Stanford, deceased, and the application having been published the time prescribed by law, and no objection of file or otherwise having been made. It is ordered by the court that said letters be granted." (Not signed by ordinary.)

"I, Cordelia S. L. Stanford, do swear that John R. Stanford, deceased, died without any will, so far as I know or believe, and that I will well and truly administer on the estate of said deceased, and discharge, to the best of my ability, all my duties as administrator, so help me God.

Sworn to and subscribed before me, this November 11th, 1867.

C. I. ST. L. STANFORD."

"Ordinary's Office, Georgia, Habersham County, Clarksville, Ga.

I, Robert N. Groves, ordinary of said county, do hereby certify that the foregoing copy of order and oath is a correct copy from the minutes of this court.

Given under my hand and seal of office, this 16th day of November, 1881.

ROBERT N. GROVES,
Ordinary, (LS.)"

Plaintiffs then offered Robert N. Groves, ordinary of said county, as a witness to prove that there was no further evidence of record in said ordinary's office of Mrs. Stanford's qualification as administratrix of said estate, no bond or letters to be found of record;—which was, upon ob-

jection of defendants' counsel, rejected by the court, and plaintiffs excepted.

Plaintiffs offered in evidence copies of the *Southern Watchman*, a newspaper published in Athens, Georgia, which contained the advertisement of the application of Mrs. Stanford for letters of administration upon the estate of John R. Stanford, which advertisement showed that the notice required by law had been published for twenty-five days, to the next regular term of the court, which was on the 4th day of November, 1867, which was, upon objection of defendants' counsel, rejected by the court, and the plaintiffs excepted, and which advertisement is as follows:

"GEORGIA—Habersham County.

Whereas, Mrs. Cordelia D. Stanford applies to me for letters of administration on the estate of John R. Stanford, late of said county, deceased: These are therefore to cite all persons concerned, to show cause, if any they have, within the time prescribed by law, why said letters should not issue to the applicant. Given under my hand, this the second of October, 1867.

W. S. EAWIN, Ordinary."

October 9th, date of first insertion.

All of this was excluded by the court, and plaintiffs excepted.

There was a verdict for the defendants, and the plaintiffs filed their bill of exceptions, and assign the following errors upon the several rulings and charges of the court, made and given on the trial:

(1.) Because the court admitted the record, to-wit, the bill and decree, in evidence, over the objection of plaintiffs' counsel thereto.

(2.) Because the court excluded the evidence attacking the appointment of the administratrix.

(3.) Because the court charged as follows: "I charge that these plaintiffs cannot recover, if you find that this administratrix was then and is still acting as such, and has never been discharged. The right to recover is in the administratrix, unless the heirs at law allege and prove that she refuses to bring this suit."

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(4.) Because the court charged as follows: "That the decree mentioned between these parties is a valid decree, and if the defendants purchased the lands from W. S. Erwin and paid value for it, they got a good title as against these plaintiffs."

(5.) Because the court charged as follows: "Whether the decree was valid or not, if W. S. Erwin went into possession *bona fide* under this decree, and he afterwards sold to these defendants, and they have been in peaceful, quiet and adverse possession of this land for seven years before the bringing of this suit, then the decree would be color of title at least, and seven years of adverse possession *bona fide*, under color of title, and would bar the plaintiffs from recovery in this case."

(6.) Because the court held "that, after the bill had been dismissed by the court for want of equity, and because there was an adequate remedy at common law, the superior court of Habersham county could take jurisdiction and re-instate said case and make the decree thereon."

(7) Because the court held that, under the pleadings of the bill filed by Hyatt, McBurney & Co., the superior court of Habersham county had jurisdiction to divide out in kind the real estate of deceased among his creditors, by parcel, and without a sale, as provided by law relating to the sale of intestate estates, and further holding that the minor children of said Stanford, and the other children, who are married women and not parties to said bill, were bound by the decree thereon, and that the title to said real estate was divested by said decree.

This being one of a number of cases brought by the plaintiffs against different defendants to recover most of the landed estate which was claimed to be in their ancestor at his death, and all depending upon the same principles, has been fully, ably and exhaustibly argued, and our decision is invoked upon all the questions made, with a view to the settlement of the entire litigation growing out of the administration and distribution of the intestate's

estate. Commending, as we do, the motive which prompted this request, we will endeavor, as far as we are authorized from the record before us, to comply with it.

1. The grounds insisted upon by the plaintiffs in argument are, first, that the grant of letters of administration on the estate of Stanford was void, in that there was no petition filed making application for the same; that the citation, upon which the letters were granted, was published only twenty-five days previous to the commencement of the regular term of the court of ordinary, at the adjourned term of which the administration was granted and the administratrix was qualified by taking and subscribing the oath, it not appearing that she gave the bond also required by the statute. That the party appointed acted in the administration, and by means thereof brought back to the estate the property involved in this litigation, and which had been parted with by the intestate in his lifetime, is not questioned. Where the appointment was used to collect the effects of the estate, it is treated as valid; and if available for that purpose, it would seem that it should be equally so for the purpose of distributing them among the persons entitled thereto; this only by way of general remark. The precise question we are called upon to determine is, whether this is, for any or all the causes assigned, a void or merely an irregular or voidable administration.

It is true that in *Fisschesser vs. Thompson*, 45 Ga., 459, a majority of this court held that an application for a twelve month's support of the family of a deceased person should be made by a petition in writing, and notice should be given to the representative of the estate, if there be one, and the order of the ordinary should always recite the names of the persons notified, and that when the order of the ordinary failed to recite these prerequisites, the judgment was void as against creditors of the deceased, who had no notice of the application, and they might attack it whenever and wherever presented. This

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was the view of Warner, C. J., who thought, as he elsewhere expresses it, "that the judgment carried its death wound upon its face." Montgomery, J., concurred in the judgment, for the reason that the proceeding was "a special one before the ordinary, as contradistinguished from the court of ordinary," and everything required by the Code to be done should appear on the face of the proceedings, in order to give the ordinary jurisdiction. McCay, J., deeming this a proceeding before the court of ordinary, dissented, on the ground that courts of ordinary in this state are courts of general jurisdiction, and their judgments are not void, because the proceedings upon their face do not show such prerequisites; that the judgment of a court of general jurisdiction is not void, because its proceedings fail to conform to the rules of practice prescribed by law for the transaction of its business; such failures are irregularities, and cannot be objected to, except in the court giving the judgment, and on a proceeding for that purpose; such judgments of the court of ordinary are entitled to the presumptions allowed by law to the judgments of any other court of general jurisdiction. In granting this administration, the court of ordinary acted; it was not the action of the judge, but of the court. Code, §331. This dissenting opinion, we are satisfied, embodies, in a concise and comprehensive form, the effect to be given to judgments of the court of ordinary, the presumptions in their favor, and the mode in which they must be attacked and set aside, as has been since declared by this court.

This is a very different question from that determined in *Head vs. Bridges*, 67 Ga., 227, where it appeared affirmatively from the recitals in the judgment, that the court rendering it had not taken the steps requisite to confer upon it jurisdiction to act in the matter; this court held the proceeding void, but had there been no such recital their holding would have been otherwise. See *Id.*, 233, where the authorities are collated and commented on by Crawford, J., as well as the concurring opinion of Jackson,

C. J., p. 237, and the dissenting opinion of Speer, J., p. 239.

What has been already said applies with equal force to the other grounds of objection to this administration.

It is quite true that the order appointing the administratrix does not recite that she gave the bond required by law, but from that omission it cannot be inferred that she did not give it, nor could the judgment that appointed her be collaterally attacked by proof going to show a non-compliance in this respect.

If the administration was granted upon an insufficient citation, as to the length of time it was published, this fact could not be shown collaterally. 67 *Ga.*, 103, 106; 65 *Id.*, 412. If, however, the grant was made out of term, and that fact was made to appear, it would render it void. *Bell vs. Love*, this term. But such is not the case here; it was made at an adjournment of a regular term of the court, and when so made the citation had been published the requisite length of time. The citation should be published for thirty days, and at the first regular term after the expiration of that time, it should be heard or regularly continued. Code, §2503. If the time of publication expires during the continuance of the regular term, would action upon the application be in order at any subsequent term, unless it was regularly continued? This may be doubtful. The question, then, is, must the time of publication of the citation expire before the first day of the term? No case has been produced directly to that effect, and the law regulating the times at which the terms of the court of ordinary are to be held, the keeping open the office of the ordinary and the business he may transact between terms, together with the adjournments of the regular terms of that court, might lead us to a conclusion somewhat different from that insisted on by the plaintiffs. These courts are required to be held on the first Monday of each month by the ordinary. Code, §4111. This official is required to keep his office open for the transaction of all business,

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at all times, except Sundays and holidays; but he can admit no will to record, nor can he grant letters testamentary, or of administration, or guardianship, or letters dis-missory, or any order for the sale of real estate, except at a regular term of the court. *Id.*, §4112. If, from any circumstances, he should fail to hold the court at the regular term, or at any adjourned term, or the business of the court requires it, he or his deputy clerk may adjourn the court to such times as he may think proper, provided such adjournment is entered on the minutes of the court. *Id.*, §4113. Now, what business is it that would require the adjournment of the court, in order that it might be legally transacted? Clearly it is only such as could not be attended to between terms, and as is specifically mentioned in section 4112—the admission of wills to record, the grant of letters testamentary, of administration, guardianship, etc. From this it seems clearly and irresistibly inferable that any of these acts may be done at the adjournment of a regular term, ordered in the manner prescribed by law.

If not the identical question here presented, one bearing a close and almost perfect analogy to it was determined by this court in *Smith et al. vs. Thompson*, 3 Ga., 23, and afterwards cited and approved, 53 Ga., 208, 211. The principle in those cases to some extent controls this, and makes this grant of administration, so far as concerns the publication of the application for the same, sufficiently regular and legal to save it from being treated as a mere nullity.

If the publication of the citation should have run full thirty days prior to the commencement of the term, in order to perfect service of the process, and we are of opinion that this is the proper practice, then the notice did not fulfill the requirements of the law, but was an imperfect attempt to do so, and had objection been made, no judgment could have been properly rendered on it at the adjourned term. Like similar cases of defective service of process returnable to the superior court, it would, under the law, have gone over to the next succeeding term, yet

the fact that it was acted on at an improper time, during the regular term, would not render the action void. It was not essential that it should run the entire period, in order to give the court jurisdiction. The judgment rendered was certainly irregular but not void, and the defect could be cured by acquiescence and ratification, express or implied. At all events, it could not be collaterally attacked and annulled.

The cases of *McGee vs. Ragan*, 9 Ga., 135, and *Torrance vs. McDougald*, 12 Id., 526, cited by the learned and indefatigable counsel for plaintiffs, seem to us distinguishable from this in essential particulars. In each of them it affirmatively appeared from the proceedings that other persons than those making application for the administration, and in whose names the citation was issued and published, were appointed after a term or more had intervened between that at which the applicants should have received their appointment, and when the appointment was made. Consequently the administrations were granted without citation or notice, and were rightly held to be void.

This administration was taken out in 1867, and up to this hour no direct attack has been made upon it; nor until this trial, which occurred in 1883, was it even collaterally assailed. During this long period many and important rights have vested under it in innocent parties; and it would require a very clear and strong case to justify any court in overturning it, a case of fraud, actual and intentional upon the part of the claimants of rights under it, fully as strong and clear as that presented by the case of *McArthur and another vs. Matthewson and another*, 67 Ga., 134, 144. The record presents no such case for relief, either in a court of law or a court of equity.

2. The decree from which the defendant Kimsey derives title, which was entered in 1872, was, at the trial of the present case, objected to as void, because there were no allegations or statements, nor any prayers in the bill upon which

it could be rendered; because it had been taken out of the superior court and carried by writ of error to the Supreme Court, and could not by an agreement be re-instated in the former court; that by the writ of error the superior court lost its jurisdiction of the case, which could only be restored by the order and judgment of the Supreme Court, reversing or affirming the judgment on demurrer; because the court had no jurisdiction of the subject-matter or parties, and no power or authority to divide lands belonging to the estate of Stanford among his creditors and others having claims thereon; and because the plaintiffs in this common law suit were necessary parties to such proceeding; that they were, in fact, never made parties thereto, and were in no manner represented or heard in the trial of the same.

That the court of equity of Habersham county had jurisdiction concurrently with the court of ordinary, both of the subject matter and parties, is evident from §2600 of the Code. 45 *Ga.*, 97; 50 *Id.*, 264. The defects in the stating part of the bill and in the prayer, as well as the objections to which the decree is open, amount to great irregularities, but do not render the proceeding void, at least as to persons acquiring thereunder *bona fide*. 50 *Ga.*, 566; 53 *Id.*, 209. This court in *Ross and others vs. The Southwestern Railroad Company and others*, 53 *Ga.*, 514, went much further than the exigencies of this case require in protecting the rights of parties who were not so clearly shown to have been *bona fide* purchasers as was this defendant, under a decree founded upon proceedings much more anomalous and irregular than in the present instance; the decree in that case was declared irregular and unwise, but not void.

The administrator of Stanford was a party to the bill, and consented to the decree. His distributees, whether minors, or married women, or adults, were represented by her, and in the absence of collusion between her and the other parties, which is not pretended, are bound by the

decree (61 *Ga.*, 381 ; 64 *Id.*, 670); and being a party to the suit, she was appointed guardian *ad litem* for the minors, and did not decline to act for them in that capacity; no order making them parties by their said guardian was necessary to bind them. *Brown vs. Anderson*, 13 *Ga.*, 171, is directly upon the point.

By this decree, these plaintiffs received benefits which they could not have obtained without liberal concessions made by the creditors of their father. By it his debts were paid out of his effects, and provision was made, by way of homestead and exemption, for the family. These debts were created prior to the enactment of our present liberal exemption and homestead law, and were much in excess of the assets liable to their payment. This decree has remained undisturbed for eleven years, and were it never set aside, it would probably be impossible to put the parties to it in *statu quo*, and if this were practicable, it would not inure to the benefit of those complaining of it. We think that they would be seriously hurt by such a course; that the strict legal administration which it would necessitate would deprive them of the advantage thereby obtained. It would unsettle rights upon which others have securely reposed, and render unstable the judgments and decrees of courts rendered for the final settlement of such rights.

Statutes of limitation have ever been regarded as measures of repose; the law has been aptly characterized as *saluberrima lex*. In furtherance of this policy, all bills of review, or for a new trial, in a court of equity (unless the latter be founded on proof of perjury in a material witness for the prevailing party), must be brought within three years after the judgment or decree has been rendered. Code, §2919. Code, §4220, prescribes the same limitation as to bills of review, pure and simple, and excepts from the bar cases of infancy, coverture, imprisonment and insanity, but requires them to be brought within three years from the removal of either of those disabilities.

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That this policy has been steadily pursued and rigidly applied by this court, see *Ross et al. vs. The Southwestern Railroad et al., ut sup.*

3. The settlement of these questions dispenses with the necessity of considering and determining others made by this second. It is immaterial whether the defendant's deed be good color of title upon which to found an adverse holding, or whether the plaintiffs are authorized to maintain their suit, irrespective of the rights or action of the administrator. We find no error in any of the rulings or charges of the judge, of which the plaintiffs have complained.

Judgment affirmed.

BAILIE & BROTHER vs. MOSHER et al.

The salary of an officer of a railroad company which exceeds five hundred dollars per annum is subject to garnishment. The act of 1850, which declares the salaries of all officers of all corporations, except municipal corporations, where the salary exceeds five hundred dollars, to be subject to garnishment (Cobb's Dig., 88), has not been repealed by any subsequent act.

April 8, 1884.

Railroads. Master and Servant. Garnishment. Before Judge EVE. City Court of Richmond County. November Term, 1883.

Bailie & Brother sued out a garnishment, based on a judgment in their favor, against E. G. Mosher and F. G. Mosher, and summons of garnishment was served on the Augusta and Summerville Railroad Company. The garnishee answered that it owed F. G. Mosher nothing. As to E. G. Mosher, it filed an amended answer, in which it alleged as follows :

"That said respondents are indebted to said Edward G. Mosher in the sum of three hundred and seventy-five dollars, on account of salary as superintendent of said corporation, the Augusta and Summerville Railroad Company, the said Edward G. Mosher being elected

such superintendent by the board of directors of said corporation at their annual meetings, at and for a salary of fifteen hundred dollars per annum, payable monthly, and liable to be discharged by said board at any time, in which event the company would be liable only up to time of discharge "

Plaintiffs moved to enter judgment against the garnishee on this answer, but the motion was overruled, and the garnishment was dismissed. Plaintiffs moved for a new trial, which was refused, and they excepted.

HARPER & BROTHER, for plaintiffs in error.

ADOLPH BRANDT FRANK H. MILLER, for defendants.

BLANDFORD, Justice.

The question presented by the record is, whether the salary of an officer of a railroad corporation which exceeds five hundred dollars is subject to garnishment.

The act of 1850 declares that the officers of all corporations, except municipal corporations, where the salaries exceed five hundred dollars, are subject to garnishment. Cobb's New Digest, p. 88.

Thus the law is written. If this act of 1850 has been repealed, we have been unable to find the repealing act, and the astute counsel who argued the case for defendants in error have been unable to call our attention to any such act. The act of 1855-6, upon the subject of attachment and garnishment, has been suggested as showing a repeal of the act of 1850, but wherein the learned counsel saith not. The act of 1855-6 only regulates the process of attachment and garnishment, but does not interfere with the subject of garnishment, which was left as it stood before the passage of the act.

The act of 1845, Cobb's Digest, 88, exempts the wages of journeyman mechanics and day laborers, as to their daily, weekly or monthly wages in the hands of their employers.

The act of 1872, pamphlet, page 43, so far modified and

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changed the act of 1845, as to make the wages of a person in the employment of another subject to garnishment, where the consideration of the debt was for provisions for the use of the employé and his family. The act of 1875 further amended the act of 1845 and the act of 1872, so as to make wages subject to garnishment, where the consideration of the debt was for services rendered by a physician or surgeon. Pamphlet, page 21.

The act of 1875, pamphlet, page 17 (Code, §3554), in effect, repeals the acts of 1872 and 1875, and restores in full force and vigor the act of 1845. It will be seen that none of these acts operate upon the act of 1850, and they leave it in full force.

The court erred in discharging the garnishee and refusing the new trial.

Judgment reversed.

THE CENTRAL RAILROAD vs. GLEASON & HARMON.

1. A railroad company which owns a warehouse or place of deposit for goods and freight which are to be delivered to consignees stands upon the same footing as to liability for injuries to persons and property, by reason of not having safe and secure roads and ways for ingress and egress to and from such freight, as any other person. Its liability is the same as that of others in like circumstances; no greater and no less.
- (a.) This court has held that where a railroad had a cotton yard, it was the duty of the company to keep the yard and flooring in such order for public use as not to occasion damage to property of those who are compelled to use it; and if damage results from the negligence of the company or its agents, it will be liable. If the property owner or his agent and the company were both at fault, the doctrine of apportionment of damages would apply.
2. Where the court has given in charge to the jury principles which are afterwards embodied in separate requests by a party to the case, he is not bound to repeat them.
3. All the issues of fact having been fairly left to the jury and passed upon by them, there being no violation of law in the instructions of the court, and he being satisfied with the finding, this court will not interfere with his discretion in refusing a new trial.

April 19, 1884.

Railroads. Damages. Negligence. Warehouses. Before Judge HARDEN. City Court of Savannah. July Term, 1883.

Gleason & Harmon brought suit against the Central Railroad, to recover for a mule alleged to have been fatally injured by stepping into a crack negligently left by defendant in the flooring of its cotton yard, where this and other dray mules were commonly driven.

This case will be found reported in 69 *Ga.*, 200. On the second trial, the jury found for plaintiffs \$175 00, with interest. Defendant moved for a new trial, on the following among other grounds:

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the court refused to give certain requests in charge in the language requested.

(3.) Because the court charged as follows: "If it is shown that damage occurred on account of this place not being in proper repair, it is for the railroad company to show that it used all ordinary care and diligence in keeping it in repair, as the burden is on them to show it; it is a matter of no importance what witness it is shown by; the burden is on the company, and it is necessary for it to appear."

(4.) Because the court charged as follows: "If he (meaning the driver of the truck) has used diligence (meaning ordinary care and diligence), and if he (meaning plaintiff's property) has been injured, even though it may be to some extent his fault, still the railroad company would be liable, if it were also at fault; but the amount of the damages would be reduced by the amount of negligence on his part; and you should apportion it among the parties according to the amount of fault on each side."

The motion was overruled, and defendant excepted.

LAWTON & CUNNINGHAM, for plaintiff in error.

The Central Railroad vs. Gleason & Harmon.

CHARLTON & MACKALL, by S. B. ADAMS, for defendants.

BLANDFORD, Justice.

1. A railroad company which owns a warehouse or place of deposit for goods and freight which are to be delivered to consignees stands upon the same footing as to liability for injuries to persons and property, by reason of not having safe and secure roads and ways for ingress and egress to and from said freight, as any other person; the liability is the same, no greater, no less.

When this case was before this court at the September term, 1882, 69 *Ga.*, 200, it was held, "that where a railroad company had a cotton yard, it was the duty of the company to keep the yard and flooring in such order for public use as not to occasion damage to the property of those who are compelled to use the same; and if damage results from the negligence of said company or its agents, it would be liable; if the property owner or his agent and the company were at fault, then the doctrine of apportionment of damages would apply."

2. These principles, we think, were given by the court in his general charge to the jury, which was fair and full, and substantially embraced the requests of the plaintiff in error. Where the court has, in his instructions to the jury, given principles in charge to the jury, which are afterwards embodied in separate requests by a party to the case, he is not bound to repeat the same.

3. All the issues of fact in this case were left fairly to the jury by the court, and they have passed upon the same. There being no violation of law in the instructions by the court to the jury, and he being satisfied with the finding of the jury, this court will not interfere with the discretion of the court in refusing the new trial.

Judgment affirmed.

VARNER vs. THE STATE OF GEORGIA.

Where one is seeking to steal the property of another, it is lawful for the owner of the property to furnish opportunities to the intended thief, and thereby entrap him.

(a.) The accused, desiring to steal cotton, applied to another for the use of his wagon; the person so applied to informed the owner, who instructed him to let the accused have the wagon, and go with him, in order to catch him, if he attempted to carry out his purpose; this was done; the defendant left the wagon and placed his hand upon a bale of cotton, when the owner and others concealed near by arrested him:

Held, that the accused was guilty of an attempt to commit larceny.

The *animus furandi* was not affected by the conduct of the owner.

April 8, 1884.

Criminal Law. Larceny. Before Judge LAWSON. Morgan County. At Chambers. January 2, 1884.

Reported in the decision.

CALVIN GEORGE, by J. C. REED, for plaintiff in error.

ROBERT WHITFIELD, solicitor general, by J. H. LUMPKIN, for the state.

BLANDFORD, Justice.

The plaintiff in error was placed on trial in the county court of Morgan county, charged with the offense of attempt to commit a larceny. The evidence showed that the defendant was preparing to steal certain cotton of the prosecutor. He applied to one Joe Shy for the use of his wagon. Shy informed prosecutor, who told him to let the accused have the wagon, and to go with him, and to keep him, prosecutor, informed, so that he could catch the accused, if he attempted to carry out his purpose, which Shy did. The prosecutor and several others went to the gin-house. The defendant drove to the gin-house, and went up to and placed his hands on the cotton when prosecutor arrested him.

Verner vs. The State of Georgia.

The county judge, among other things, instructed the jury, "that if they believed from the evidence that the accused first approached Joe Shy and proposed to take the cotton, and the latter consented, but reported the fact to Akens, the owner, the prosecutor, who directed Shy to go with the accused and let him have the wagon and mules, and did go with him for the cotton, but the accused was frustrated in the design, then he was guilty of an attempt to commit larceny."

The accused was found guilty, and presented his petition for a writ of *certiorari*, alleging as error the charge of the court hereinbefore set forth. The judge of the superior court dismissed the application for *certiorari*, and affirmed the ruling of the county court, and this judgment is assigned as error.

One who is trying to steal the property of another is in the condition of a beast of prey, and it is as lawful to trap such a person as it is the beast of prey.

The question in such a case, as regards the defendant, is as to the *animus furandi* with which he acts. What was the purpose of defendant in going to prosecutor's gin-house? Was it his purpose to steal the cotton of prosecutor? If it was, he is guilty, and it would seem that the conduct of the prosecutor could have but little effect upon the crime; and such was, in effect, the ruling of this court in 35 *Ga.*, 247.*

Let the judgment of the court below stand affirmed.

*On the subject of traps to catch thieves, and to what extent they may be carried, see 55 *Ga.*, 391 *et seq.*; 1 Bish. Crim. Law, §262, and citations; 2 Failey (S. C.), 569; 2 East P. C., 636, 12 B. & P., 508; 2 Car. & K., 195, 628; 1 Car. & M., 220 (41 E. C. L., 124), 1 Curt. C. C., 361; 18 Ind., 386. (Rep.)

CATO vs. THE STATE OF GEORGIA.

1. That the clerk of the superior court at the trial furnished counsel a list of names of persons on the array of jurors, some of whom were described by the initial letters of their given names, and that the full names of the jurors were written out on the jury list, furnished no ground for challenge.
2. Where a juror, when asked whether his mind was perfectly impartial between the state and the accused, answered that he "could not say it was," but when told he must answer the question yes or no, answered "yes," there was no error in holding him competent.
- (a.) It is doubtful whether the decision of the court as a trier in this collateral issue is a subject of review.
3. The charges and instructions of the court as to justifiable homicide, murder and malice were not erroneous. The case is one of murder, if the evidence submitted on the trial is true; there is no element in the case but murder, and the charge of the court as to voluntary manslaughter and justifiable homicide was so much favor shown by him to the accused.

April 25, 1884.

Criminal Law. Murder. Jury and Jurors. Charge of Court. Practice in Supreme Court. Homicide. Before Judge HAMMOND. DeKalb Superior Court. September Term, 1883.

To the report contained in the decision it is only necessary to add the following:

Defendant introduced no evidence. The evidence for the state showed, in brief, the following facts as to the homicide: Dukes (the person killed) stopped by the house of one Henderson, and said he had more "rations" than he could conveniently carry. He put down such things as he desired to leave, and was about taking his departure when he met defendant, Henry Cato. They began talking, and the discussion waxed warm. Defendant began cursing Dukes, and the latter told him to stop or they would have a difficulty; defendant persisted, and Dukes put down the "rations" which he was carrying. Other members of the Henderson family came up, and one of them

Cato vs. The State of Georgia.

told Cato to go on home and quit cursing up there in front of the house; while another one told Dukes to go home and not to mind Cato, whom he characterized as an "old fool." Dukes said he did not like to be cursed merely because Cato had a little piece of land. He was again told to go home. Defendant went into the house and sat down. Dukes said, "Good night to you all," and started home. Defendant jumped up, went out to Dukes, and said he wanted to see him "something about this land." Dukes replied, "You go to Mr. Winn, Henry." Defendant responded, "No, I want to see you;" and said, "You and old man John are Lock Winn's pets anyway." Dukes told him not to say that again. Defendant repeated it and put his foot on that of Dukes; the latter pushed him back; and defendant thereupon stabbed him seven times, inflicting wounds which caused death. Dukes caught hold of defendant during the stabbing, and there was a little pushing or scuffling. Dukes called out that he was stabbed to death; one of the Hendersons told them to let go each other, which was done, and Dukes soon sank from loss of blood, and dies in a few days.

The charges which are referred to in the third division of the decision are alleged as erroneous in the amended motion for new trial, as follows:

(1.) Because the court erred in charging the jury that "justifiable homicide is the killing of a human being by a person in self-defence, that is, in defence of his own person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on his person. Now if the defendant, as charged in this indictment, killed the person he is charged to have killed, and as therein charged, and he did that in self-defence, that is, in defence of his person against the man he killed; if that person so killed was manifestly intending or endeavoring, by violence or surprise, to commit a felony on his person, then the law says such killing would be self-defence and justifiable. If he killed the person, as charged in the indictment, be-

cause he may have had a bare fear that such person so killed was intending or endeavoring, by violence or surprise, to commit a felony on his person, he would be guiltless; but the law says it must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing acted under the influence of those fears, and not in a spirit of revenge. The law says further that, if a person kill another in his own defence, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary, and that the person killed was the assailant, and that the slayer had in good faith declined further combat before the mortal blow was given."

(2.) Because the court charged as follows: "Did the defendant kill the person that he is charged to have killed, in the indictment, and as therein charged? If he did, were the circumstances surrounding the parties at the time of the killing sufficient to excite the fears of a reasonable man that the person whom he killed was manifestly intending or endeavoring, by violence or surprise, to commit a felony on his person? If the circumstances were of that kind, it would be justifiable homicide, and the law would require you to find the defendant not guilty of the offense charged in the bill of indictment."

(3.) Because the court charged as follows: "Do the circumstances of the case show a deliberate intention on his part unlawfully to take away the life of the person he is charged to have killed; or do the circumstances show that there was no considerable provocation, and do they show an abandoned and malignant heart?"

(4) Because the court charged as follows: "If the evidence in the case shows that the defendant killed the person whom he is charged to have killed and as therein charged, then the presumption in law would be, as soon as that is shown, that the killing was murder; and it must appear from the evidence, before you can find

the killing to have been justifiable homicide, or to have been voluntary manslaughter, that it was not an unlawful killing, or that it was not done with malice aforethought, either express or implied. That does not mean that the defendant must introduce evidence for the purpose of showing that fact."

CANDLER, THOMSON & CANDLER, for plaintiff in error.

C. ANDERSON, attorney general; B. H. HILL, solicitor general, for the state.

BLANDFORD, Justice.

The plaintiff in error was indicted for murder, found guilty, and sentenced to suffer death. He made a motion for new trial on many grounds, and the court overruled this motion whereupon he excepted, and this is here assigned as error.

1. The clerk at the trial furnished counsel a list of the names of the persons on the array, some of whom were described by the initial letters of their given names. The counsel for the accused challenged these persons as not being on the list of persons selected by the jury commissioners, on the list filed in the clerk's office; but it appears that the full names of the jurors were written out on the jury lists. The court overruled this objection, and we think he did right. Any other ruling would have been contrary to law. No reason is necessary to be stated in support of this ruling. This includes the first, second and third grounds in the motion for new trial.

2. The 4th ground of error is, that the court held Brice Webb to be a competent juror, he having answered the question that, as to his mind being perfectly impartial between the state and the accused, "that he could not say it was," but when told he must answer the question yes or no, he answered, "it was."

We do not think that there is anything in this ground

of the motion. When the juror was required to make a direct response to the question, he qualified himself, and the court did not err as prior in holding him qualified. This was a collateral issue, and it is doubtful whether the same is the subject of review; but at all events there was no error. *Dumas vs. The State*, 65 Ga., 472; 68 *Id.*, 687; 63 *Id.*, 600.

The charges and instructions of the court as to justifiable homicide, murder and malice, as in the amended motion for new trial complained of, are not erroneous. These charges are in accordance with the Code

This case is a fearful one of murder, if the evidence submitted on the trial is true. There is no element in the case but murder, and the charges by the court as to voluntary manslaughter and justifiable homicide were so much favor shown by the court to the accused. If the evidence be true, then there was nothing in the case but murder. The court could well have hypothesized the facts as testified to by the witnesses, and have stated to the jury, "if these facts have been proved to your satisfaction, the defendant is guilty, otherwise he is not."

Judgment affirmed.

SIMS *et al.* vs. ALBEA, sheriff, *et al.*; DuBOSE *et al.* vs.
BANK OF WASHINGTON *et al.*

1. Where a *fi. fa.* was levied on property which had been conveyed voluntarily by a husband to his wife, and on the trial of a claim interposed thereto, a compromise was effected, and a verdict rendered by agreement, finding some of the property subject and the balance not subject, and a fund was raised from that found subject, the moving *fi. fa.* had a lien thereon, and could take the same, unless other claimants of the fund could show an equal or superior lien upon it.
2. The holders of *fi. fas.* who took no part in the claim case or in the compromise effected therein, can obtain no benefit therefrom. If they had a lien already, it was not displaced; but if they had none before, a lien was not thereby created in their favor.

Sims et al. vs. Albee, sheriff et al.; DuBose et al. vs. Bank of Washington et al.

- (a.) One who became a creditor of the husband after the actual record of a voluntary conveyance from him to his wife, and did not reduce his claim to judgment until several years thereafter, had no lien on the property or a fund arising therefrom.
3. A voluntary settlement on the wife by her husband, not recorded in three months, would be void as to a creditor who credited the husband before the actual recording of the settlement, provided that the credit was based on that property.
4. Where one creditor, in order to bring a fund into court, abandoned a claim which he had on other property, equity will not permit another creditor, who has a claim on the money and also on the property relinquished, to take the money, but will remand him to the property, it being accessible to him; especially so, where he stood by, and took no part in the fight which resulted in a compromise verdict under which the fund was brought into court.
- (a.) This case differs from 8 *Ga.*, 194; 21 *Id.*, 207; 27 *Id.*, 47; 67 *Id.*, 146.

May 13, 1881.

Liens. Judgments. Debtor and Creditor. Husband and Wife. Before Judge POTTLE. Wilkes Superior Court. May Term, 1883.

Sims & Company, Franklin and the Bank of Washington, who were judgment creditors of B. J. Jordan, ruled the sheriff for a fund in his hands arising from the sale of certain property as belonging to Jordan. The sheriff answered that he had in hand \$3,740.00 arising from a sale under three county court *fi. fas.* in favor of Sims & Company, and three superior court *fi. fas.* respectively in favor of DuBose, Fortson and M. A. Simpson, who also were claiming the fund. They were made parties respondent to the rule, as also were W. W. Simpson and R. A. Simpson.

The evidence showed, in brief, as follows: Sims & Company's judgments were obtained July 11, 1881; Franklin's, July 11, 1881; Bank of Washington's, November 21, 1881; and the *fi. fas.* issued under these judgments were all levied on the property sold, and those of Sims & Company participated in the sale. DuBose's judgment was obtained May 2, 1882; Fortson's, May 1, 1882; M. A.

Sims et al. vs. Albee, sheriff, et al.; DuBose et al. vs. Bank of Washington et al.

Simpson's, May 2, 1882; W. W. Simpson's, November 21, 1881; R. A. Simpson's, November 21, 1881. All of these were levied on the property sold, and also on the other property included in the deed of gift mentioned below. The property was sold as Jordan's, and he had returned it for taxes since the date of the deed to his wife and children. Jordan made a deed of gift to his wife and children, covering the property sold and other property. This was dated August 19, 1877, and recorded August 19, 1878. The debt to Sims & Company was made in 1880 and 1881, principally in 1880, and Sims testified that he did not know of the deed of gift; the debt to the Bank of Washington was made February 2, 1878, before the deed was recorded; Fortson's debt was made prior to the execution of the deed; the debts to the Simpsons between its execution and record; and that to DuBose, March 4, 1880, after the record of the deed. The *fi. fas.* of contestants were levied on the property, and Mrs. Jordan and children interposed a claim. Contestants attacked the deed, on the grounds respectively that the claim of Fortson was older than the deed; that the deed was not recorded in three months, and that it was fraudulent and void as to creditors. A mistrial was had; and when the case again came on for a trial, a compromise was effected, by which an agreed verdict was rendered, finding the property sold subject and the other property not subject.

Before the sheriff's sale, DuBose, Fortson and M. A. Simpson filed a bill to enjoin the sheriff and Sims & Company from selling under the *fi. fas.* of the latter; but the injunction was refused, and the parties remanded to assert their rights and equities by rule to distribute the fund as under a bill in equity.

At the trial in May, 1883, it was admitted that Jordan was insolvent.

The jury found for the contestants. Movants moved for a new trial, on the following among other grounds:

Sims et al. vs. Albea, sheriff. et al.; DuBose et al. vs. Bank of Washington et al.

(1.) Because the verdict was contrary to law, evidence and the charge of the court.

(2.) Because the court charged as follows: "If the parties did not mean that the deed was void for fraud against creditors, and the property was not found subject for that reason, then Sims & Company's *fi. fa.* had no lien on it. It could have no lien on the property, unless it was found to be Jordan's, in avoidance of the deed for fraud."

(3.) Because the court charged as follows: "If you believe that the verdict taken, as it is admitted was (done) by consent, was the result of compromise by which Mrs. Jordan surrendered a portion of the property covered by the deed, and was not intended to mean that on the issue, the deed of 1877 was made to defraud creditors, then the plaintiffs had no lien on the property and no lien on the fund."

(4.) Because the court refused the following request: "If Sims & Company, Bank of Washington, Georgia, and A. Franklin have shown any of the badges of fraud in connection with this deed, then the presumption is the deed was void and fraudulent as to them, and the burden of proof is on Miss DuBose, Simpson and Fortson, the contestants, to show that the deed was not fraudulent and void as to Sims & Company, Bank of Washington, Georgia, and A. Franklin; and unless said DuBose, Simpson and Fortson have overcome this presumption, by showing that the deed was not fraudulent and void as to Sims & Company, Bank of Washington, Georgia, and A. Franklin, then said Sims & Company, Bank of Washington, Georgia, and A. Franklin, having the oldest judgments, are entitled to be paid first."

(5.) Because the court refused the following request: "If Sims & Company, the Bank of Washington, Georgia, and A. Franklin have shown any of the badges of fraud, such as indebtedness on the part of Jordan at the time of making deed, secrecy on his part, failure to record the deed in three months, it raises the presumption that the deed was fraudulent and void, and makes a *prima facie*

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case in their favor, and unless DuBose, Simpson and Fortson rebut this presumption by proof, then Sims & Company, Bank of Washington, Georgia, and A. Franklin are entitled to be paid first, having the oldest judgments, because no title ever passed out of Jordan if the deed was fraudulent and void."

(6.) Because the court refused the following request: "It is admitted that DuBose's debt is younger than the record of the deed, and that Sims & Company's and Franklin's are also younger; then they stand upon the same footing as to the deed; but Sims & Company's and Franklin's judgments being older than DuBose's, are entitled to be paid first out of the property sold."

The court refused the motion as to Sims & Company and Franklin, and granted it as to the bank. Sims & Company and Franklin excepted to the refusal, and DuBose *et al.* excepted to the grant of the new trial as to the bank.

SIMS & SHUBRICK; F. H. COLLEY, for Sims & Company, the Bank of Washington *et al.*

R. TOOMBS; HARDEMAN & IRVIN; W. H. TOOMBS, for Alba, sheriff, DuBose *et al.*

JACKSON, Chief Justice.

This case arose on the claim of two sets of creditors of Jordan, the defendant in execution, to a fund in court from the sale of certain property of said Jordan. The issue between them was submitted to a jury under the charge of the court. The jury found for the defendants to that issue, made on the answer of the sheriff, and the movants of the rule made a motion for a new trial. This motion was denied to all the movants except the Bank of Washington; the other movants excepted to that denial, and the defendants, in another bill of exceptions, excepted to the grant of the new trial to the bank. Both writs of error were argued together here, and will be disposed of in this opinion.

Sims et al. vs. Albee, sheriff, et al ; DuBose et al. vs. Bank of Washington et al.

The fund in controversy arose out of a portion of the property of Jordan, which was found subject to defendants' executions under a consent verdict, in which certain other property of Jordan was found not subject.

The case which resulted in this compromise verdict was made by levy upon all of Jordan's property by defendants to this rule and the claim thereof by Mrs Jordan and family, under a voluntary conveyance to her, and the issue was fraud or no fraud in that conveyance. All the property was covered by this deed. On the first trial, there was no verdict, and the court ordered an entry of a mistrial. On the next trial, the case was compromised, and the compromise, by agreement, took the form of a consent verdict, by which the property represented by this fund was condemned as subject and the balance was found not subject. The movants here were not parties to the claim case, but levied before the sale. A bill was filed to enjoin them. The injunction was denied, but defendants to the rule now before us were relegated to the contest on this rule, and allowed to make the same points as in equity under the bill.

1. The defendants clearly have a lien upon the fund. The property which the fund represents was found subject to their executions, and thus their lien has been adjudicated and fixed. The issue of fraud or no fraud in the deed of settlement was not passed upon by the jury, but, by agreement between the parties to the claim case, the defendants to this rule, the plaintiffs in that claim case, were permitted by the verdict and judgment therein to fasten their lien on this fund, on condition that they would abandon it, or all claim to it, on the rest of the property. It is perfectly clear, therefore, that the defendants must take this money, unless the movants show a superior lien thereto, to be preferred, or an equal lien, to divide the fund.

2. Have those who are plaintiffs in error here any lien at all? They did not condemn the property which made the fund. They were not parties to the claim case. They

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took no part in that fight, and can reap no benefit from its result, so far as to get a lien by it, which they did not have before. Of course, if they had one before, it was not diverted by the compromise verdict to which they were not parties or privies.

Had they any before? The deed of settlement was made on the 19th of August, 1877, and recorded on the 19th of August, 1878. The judgments of Sims & Co. were not rendered until July 11th, 1881, and those of the other movant-plaintiffs in error in the same month of the same year. So that they had no lien by judgment until that date, which was long after the deed of settlement had been made and recorded. Even their debts against Jordan were created after the actual record of this deed.

So that we cannot see upon what principle the plaintiffs in error in the case of *M. M. Sims & Co. et al. vs. Albea, sheriff, et al.* can claim any part of this fund, and the judgment denying them a new trial must be affirmed.

3. How is it with the Bank of Washington? The judgment of the bank was rendered in November, 1881. It had therefore no judgment lien. Did it have any other lien? It appears from the record that the bank's debt was made in February, 1878, before the record of the deed the following August of that year, and doubtless it was upon this fact that the court below granted the new trial to the bank. The deed, being a voluntary settlement on the wife by the husband, would be void as to creditor who credited the husband "before the actual recording of the same." Code §1778. But that credit must be based on the property settled. 28 *Ga.*, 170; *Brown vs. West et al.*, 70 *Ga.*, 201. Whether this bank gave credit to Jordan on the property which produced this fund does not appear.

4. But outside of all these points, in our judgment, there is another which must control the fund and give it to the defendants to the rule against the bank and all the movants.

The cause is in equity. The movants have all the properly

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embraced in this deed of settlement levied upon. If they have a valid claim upon the portion of the property represented by this fund, they have one equally good against the balance which the deed covers. If they have a claim against any of the property, it rests on fraud in the settlement, legal or actual fraud. They have two funds to go upon—this land condemned by defendants to this rule, and the portion not condemned. The defendants, in order to condemn this, were forced to relinquish their claim on the other. If they lose this, they lose all. If movants lose here, they are hurt only as to time, provided they can make such a case as will condemn any of the land—this money in court, or that in the hands of the beneficiaries. Will not equity make them go on the other accessible fund? The Code, section 1949, would seem to cover it. It is true that the funds must be equally accessible, and hence one creditor cannot force another on property out of the state. 39 *Ga.*, 320; 54 *Id.*, 573. But the doctrine is applicable here. The entire property is in the grasp of the movants. Their levy is on all of it. Some of it is in money, but neither the land nor money has been found subject to their claims, any more than the portion of the property not sold. They can as well litigate with their debtor and his family, the claimants, as with these defendants; and they can just as well succeed in one as in the other case. In either they must attack the deed and show the fraud. The one presents no greater barrier than the other.

It must be borne in mind that this verdict in the claim case has not settled the question of fraud in the deed. It must be also remembered that the movants were no parties to that compromise verdict. It was won by no money or skill of theirs, but by that of the defendants. So that here are two funds, one in money and the other in land. That in money one creditor has put in money, and subjected to his claim by a law-suit and a compromise verdict. To put in money the other fund, will only require, if his claim be well founded, the other creditor to undergo the same

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fight which this creditor has succeeded in. Why should he not undergo an equal burden? Equality is equity. And it strikes us that, with the land levied on upon which movants can go and defendants cannot go on account of this very verdict and judgment, the fruits of which movants would wrest from defendants, it would be unequal and inequitable to allow them to succeed. During the fight in the claim case, why did they not share the dangers and hazards of the battlefield? They were not even staying by the stuff. Quietly and without moving a muscle to help in tent or field, they now rush to divide the spoil. Equity will tell them, "Yonder is more where this came from. You shall have it when you win it, whether it be by a square, open fight, or by generalship and skillful manœuvring." It is our opinion, therefore, that the judgment be affirmed in *Sims et al. vs. Albea et al.*, and reversed in *DuBose et al. vs. The Bank of Washington*; and it is ordered.

See cited for movants, Code, §3580; 52 *Ga.*, 356; 58 *Id.*, 343; 63 *Id.*, 296; 65 *Id.*, 417; 60 *Id.*, 364, 594; 58 *Id.*, 446; 54 *Id.*, 557, 612; 8 *Id.*, 194; 21 *Id.*, 207; 27 *Id.*, 47; 62 *Id.*, 146; 61 *Id.*, 222; 68 *Id.*, 563. Bump on Fraud Con., 321 276.

For defendants, 54 *Ga.*, 569; 63 *Id.*, 296; Code, §1778; 28 *Ga.*, 170; 41 *Id.*, 435; 53 *Id.*, 159; 20 *Id.*, 223-5; 66 *Id.*, 720; Code, §§2662.

It will be observed that this case differs widely from 8, 21, 27, and 62 *Ga. supra* cited by movants, in this important particular, on the doctrine of two funds, where one is in money in court. to-wit: that the very verdict and judgment which brought this money fund in court was obtained on conditon that the defendants to this rule would relinquish their claim on the rest of the land, and the verdict and judgment pursuant to the agreement found the rest not subject. So that the point we rule is, that where one creditor, in order to bring a fund into court, abandons a claim which he had on other property to do so, equity

Ford vs. Clark, administrator.

will not let another, who has a claim on the money, and also on the property relinquished, take the money, but will remand him to the property, especially where he stood by and took no part in the fight which resulted in a successful compromise verdict.

Judgment affirmed as to DuBose *et al.*, and reversed in the case of the bank.

FORD vs. CLARK, administrator.

1. A joint suit upon an account made by a firm was not saved from the bar of the statute of limitations by the individual acknowledgment in writing of one of the partners and his promise to pay. This was a different and new cause of action from the account sued on and was against a new and distinct party, and an amendment setting it forth was not germane to the original suit, and was properly stricken.
2. In cases of mutual accounts, which may be pleaded by way of set-off, if one of the parties should sue the other, the bar of the statute of limitations does not generally attach, unless the last item in the account is barred; *aliter*, where there is no mutual account, but a mere credit of a payment made on an account held by one party.
3. There being no evidence in this case to take any of the items of account out of the bar of the statute of limitations, there was no error in granting a non-suit.

April 8, 1884.

Statute of Limitations. Partnership. Debtor and Creditor. Open Accounts. Before Judge FAIN. Catoosa Superior Court. August Term, 1883.

Reported in the decision.

W. K. MOORE, for plaintiff in error.

R. J. McCAMY; McCUTCHEN & SHUMATE, for defendant.

HALL, Justice.

On the 29th day of December, 1873, the plaintiff commenced a suit upon an open account against John D. Gray,

Allen Kennedy and Charles Chamberlain. Gray and Kennedy were duly served, but Chamberlain resided out of the state, and was not served with the writ. Kennedy pleaded that he was not a partner with Gray and Chamberlain, and the issue on this plea was found in his favor. The items for which this suit was brought consisted of cash advanced by plaintiff to John D. Gray & Co., on the 5th of August, 1869, which amounted in the aggregate to \$3,100; of this amount the defendants, about the middle of August, 1869, paid \$600, leaving still due the plaintiff \$2,500; they failed to pay the balance, as promised, at the latter date, when Gray gave the plaintiff's agent his individual memorandum in writing, by which he acknowledged the receipt of \$2,500 and promised to account to him for it. This cause of action was barred on its face by the statute of limitations at the commencement of the suit. The plaintiff sought to relieve it of the bar by amendments to the suit, made on the 5th of August, 1874, and in January, 1883, the first of which set forth that, on the 5th of August, 1869, the defendants received of plaintiff \$3,100, and that thereafter, on the 10th day of August, 1869, they gave him an acknowledgment of that fact, and promised to pay the amount when called on; that this acknowledgment was lost, but the amount claimed was still due and owing. The last amendment varied the first by showing that the memorandum relied on was made and signed by John D. Gray individually, and that he gave his individual promise to pay this item. Upon demurrer by the defendant to these amendments, they were disallowed by the court and ordered stricken. There were several other items in the account originally sued on, amounting to some \$206, which did not appear to be barred by the statute of limitations, as claimed by the plaintiff. On the trial, at August term, 1883, of Catoosa superior court, upon the close of plaintiff's evidence, a non-suit as to these was moved and sustained by the court. To each of these rulings the plaintiff excepted, and assigns the same as error.

Davis vs. Bennett.

1. A joint suit upon an account made by Gray & Co. was not saved from the bar of the statute by the individual acknowledgment in writing by John D. Gray and his promise to pay. This latter was a different and new cause of action from the account sued on, and was against a new and distinct party; the amendment was not germane to the matter of the original suit, and there was no error in striking it. Code, §3480, and citations thereunder; 62 *Ga.*, 43; 64 *Id.*, 221.

2. Neither did the credits given in the account show such mutual dealings between the parties as to remove the bar of the statute of limitations. In the cases cited by plaintiff, there were mutual accounts which might have been pleaded as sets-off, had one of the parties sued the other. 41 *Ga.*, 44; 58 *Id.*, 190; 66 *Id.*, 49. In such cases, generally the act of limitations will not bar, unless the last item in the account was barred.

3. There was no evidence to take any of the items in this case out of the bar of the statute, and the court did not err in awarding the non-suit. There was nothing which could have justified a finding in favor of the plaintiff as to any of these charges. 15 *Ga.*, 491; 65 *Id.*, 309; *Cook vs. W. & A. Railroad*, 79 *Ga.* 619.

Judgment affirmed.

DAVIS vs. BENNETT.

1. Where a suggestion of diminution of the record and a motion to dismiss the case are made at the same time, the former has precedence.
2. Where the clerk transmits to this court original records of the court below, instead of sending up a complete transcript or copy of the record, it is such an effort to send up the record that upon it a diminution of the record may be suggested, if made in time, and the plaintiff in error be not in *laches*.
3. A record was transmitted to this court too late for a hearing on the circuit to which it belonged. When called at the heel of the entire docket (it being the last day for the hearing of arguments,

and this being the last case but one), a suggestion of a diminution of the record and motion to dismiss were both made. It appeared that the only papers here as a copy of the record were certified by the clerk to be "a true copy from the records of the minutes of the said superior court," and that plaintiff in error had had ample time to correct this error and to supply the deficiency:

- Held*, that the case will be dismissed. The plaintiff in error has lost his opportunity to correct or supply the record by his own *laches*.
4. Obliterations appear of five lines of the first page of the bill of exceptions, so as to break the connection of sentences, and destroy the sense of that paper, without any explanation in respect to the person who did it; and this vitiates the writ of error and makes it uncertain, if not totally unintelligible. Nothing can cure such a defect.

April 25, 1884.

Practice in Supreme Court. At February Term, 1884.

Reported in the decision.

G. T. HAMMOND; G. J. HOLTON & SON, by HENRY B. TOMPKINS, for plaintiff in error.

HARRIS & SMITH, by HARRISON & PEEPLES, for defendant
JACKSON, Chief Justice.

1. In this case, counsel for plaintiff in error left with the reporter a suggestion of the diminution of the record, to which the attention of the court was called. About the same time a motion to dismiss the writ of error was made. In such a case, the suggestion of the diminution has preference, because the case must be in court on a complete transcript of the record before it is ready to be tried here, and a motion to dismiss is one stage of trial.

2. But it is argued that there is no record here to amend. There is what purports to be parts of a record, which the counsel, in suggesting the diminution, swears are the original papers, and not copies, and he suggests that this is a diminution in the sense of the statute. Where the clerk transmits to this court original records of the court below,

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instead of sending up a complete transcript or copy of the record, it is such an effort to send up the record as that upon it a diminution of the record may be suggested, if made in time, and plaintiff in error be not in *laches*.

3. But it is insisted here that plaintiff in error is guilty of such *laches* that no suggestion of diminution, and none of the amendatory acts to retain cases here, can help him. The clerk's certificate to the only papers here as a copy of the record is as follows:

"GEORGIA, Coffee County.

I, C. A. Ward, clerk of the superior court of said county, do hereby certify that the within is a true copy from the records of the minutes of the said superior court in the case of Richard Bennett vs. Stafford Davis. Breach of warranty this December 5th, 1883.

C. A. WARD, C. S. C., C. C."

The statute requires that "a complete transcript of the record in such cause be made out" by the clerk, and that "such transcript, together with the original bill of exceptions, the clerk shall transmit, together with a certificate that the same is the true original bill of exceptions, and a true and complete transcript of the record in such case, to the next term of the Supreme Court," etc. Code, §4262. The certificate which the clerk makes is, "that the within is a true copy from the records of the minutes of the said superior court," etc. The certificate which the statute requires is "a true and complete transcript of the record in such case," and not merely of what is on the minutes. It is clear, therefore, that this certificate is wholly illegal. Can it be corrected? By the act of 1870, Code, §4272, no case can be dismissed for want of this certificate, "provided said record arrives in time to be heard at the term to which it is by law returnable."

This record so certified cannot arrive at this term in time to be heard, because this is the last day of the term for argument of cases.

By the act of 1880, Code, §4272(c), no writ of error can be dismissed on any ground which can be removed during

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the term to which it is returnable, even to the end of it. This cannot be removed. The end of the term is here to day.

By the act of 1877, Code, §4272 (d), no case can be dismissed by failure of the clerk to transmit the record, provided it gets to this court before this court has finished the circuit to which the case belongs, but it must be entered and heard after all the cases on the entire docket shall have been heard. This case is in that fix. It got here too late to be heard until today, and therefore it is too late to be corrected in respect to the certificate, because today the term closes but one other case from the Atlanta circuit being in like situation, the argument of which was finished the same day this case was called in its order, and the last case was heard before any steps could be taken to have it corrected.

By the same act of 1877, under which this case is entered on the docket, if the record be incomplete, it is made our duty to give such direction as will complete it if "proper in the premises and constitutional." Code, §4272 (g). It would be improper to delay this case for seven or eight months to complete this record, if it would be unjust to the other side. It would be unjust to the other side, because the defendant in error is not the movant, and need not look to the bill of exceptions, transcript of record, or certificates. The plaintiff in error must. He could have made this suggestion long ago, in time to have had the certificate corrected, the record complete and the cause heard at this term. On or before the case is called, he can make the suggestion, and have a *mandamus* issued and the defects all corrected. Acts of 1851; Code, §4282; Rule 9 of Supreme Court. A judgment for money is against him, and defendant in error is entitled to have an early trial to get his money out of him soon, if entitled to it; and having judgment below, the probability and presumption is, that he is entitled to it. So that it is not proper to postpone him for negligence of the plaintiff in

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error. Would it be constitutional? This court, in construing this act of 1877, Code, §4272 (d), held that part of it which provided for cases going over to the next term, if they got here after the circuit to which they belonged was ended, unconstitutional. The Constitution, art. 6, sec. 2, par. 6, declares that this court shall dispose of every case at the first or second term; "and in case the plaintiff in error shall not be prepared at the first term to prosecute the case—unless prevented by providential cause—it shall be stricken from the docket, and the judgment below shall stand affirmed." Code, §5134. No providential cause is shown, no good reason of any sort, why this certificate and record could not have been corrected and completed, if ordinary diligence had been used by the plaintiff in error. The constitution demands, therefore, that his case "be stricken from the docket and the judgment below stand affirmed;" and it will be so ordered.

Of course this class of cases stands on a different footing from those regularly in court, returned in time and entered on the docket of their respective circuits to be tried in regular order; but it is well that in all cases counsel for plaintiffs in error move in time to complete the record and be ready to try at the return term.

4. Obliterations appear of five lines of the first page of the bill of exceptions, so as to break the connection of sentences and destroy the sense of that paper, without any explanation in respect to the person who did it, and why it was done. This also vitiates the writ of error, and makes it uncertain, if not totally unintelligible. Nothing can cure such a defect.

Writ of error dismissed.

CUMMING vs. WRIGHT et al.

While the lien of a laborer attaches, and the right to enforce it accrues, upon the completion of the contract and when the labor has been fully performed, yet the mere existence of the lien does not give the laborer a right to come into court and claim money arising from the sale of property under an execution in favor of another party. Before this can be done, there must be a judgment of foreclosure, and process must issue thereon.

- (a.) Where a fund was raised by a sale under a mortgage *fi. fa.*, but the sheriff was notified to hold up the fund on account of certain laborers' liens which had been foreclosed for labor performed prior to the foreclosure of the mortgage, and upon the trial of a money rule, exception being taken to the *fi. fas.* of the laborers, they were withdrawn, the hearing suspended, new proceedings taken to foreclose the liens, and upon the new *fi. fas.*, so obtained, the money was awarded to them, such ruling was error.
- (b.) If the process issuing upon a complete affidavit of foreclosure be defective, it may be amended and made to conform to the affidavit; but the affidavit of foreclosure cannot be amended.

March 11, 1884.

Liens. Laborers. Mortgage. Amendment. Before
Judge SIMMONS. Bibb Superior Court. October Term,
1883.

Reported in the decision.

A. PROUDFIT; M. CUMMING, for plaintiff in error.

HILL & HARRIS, for defendants.

HALL, Justice.

The fund in controversy was raised by a sale under a mortgage *fi. fa.* in favor of the plaintiff in error. The defendants in error claimed liens upon it for labor done for the mortgagor. These several liens had been foreclosed, and the executions issuing on the judgments to enforce the same were placed in the hands of the sheriff, accompanied by a notice to hold up the proceeds of the sale, for distribu-

tion among the claimants. To effect this distribution, a rule was brought by the defendants against the sheriff.

When this rule came on to be heard, exceptions were taken to the *fi. fas.* of defendants in error, which they admitted to be well founded, as we are authorized to infer from the fact that they were withdrawn. Upon the withdrawal of these *fi. fas.*, the hearing of the rule was suspended, and new proceedings were taken to foreclose these various liens. Upon these new proceedings, other *fi. fas.* were issued, and the claim to the fund was renewed under them. The court permitted the rule to be amended, so as to conform to this altered state of the case, and it appearing that the labor was rendered by these claimants before the foreclosure of the mortgage of plaintiff in error, a sufficient amount of the same to satisfy these *fi. fas.* was awarded to them by the judgment of the court, to which judgment the plaintiff in the mortgage *fi. fa.* excepted, and this exception makes the questions we are called upon to determine.

The lien attaches and the right to enforce it accrues at the completion of the contract and when the labor has been fully performed. But the mere existence of the lien does not give the party a right to come into court and claim money arising from the sale of the property subject to it, under an execution in favor of another party. Something more than this is indispensable; the lien must be established by a judgment, and process must issue upon that judgment, in order to entitle the laborer to participate in the proceeds of such a sale. This was distinctly ruled by this court in *Love vs. Cox, sheriff, et al.*, 63 Ga., 269.

At the time of this sale, it must be conceded that the laborers had no foreclosure, upon which process issued, that could claim this fund. The process upon which it was awarded to them was new process, and was founded upon a proceeding to enforce the lien had subsequent to the sale, and subsequent to the time when the proceeds

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should have been distributed. This was not the process upon which the notice to hold up was founded, and upon which the rule to pay out was issued.

This case is distinguishable from *Harrison vs. Guill et al.*, 46 Ga., 427. There the distress warrant was merely irregular, and, to use the language of the judge delivering the opinion, time was given to get it "into shape;" here the process, together with the judgment from which it issued, was entirely withdrawn, and others were substituted for them. These latter were proceedings entirely *de novo* and independent of those for which they were substituted. Indeed, this affidavit of foreclosure could not have been amended. Code, §3504; 6 Ga., 160; 55 Id., 57; *Lewis vs. Frost*, 69 Id., 755. If the process issuing from a complete affidavit of foreclosure be defective, it may be amended and made thereby to conform to the affidavit (46 Ga., 585), as was done in *Harrison vs. Guill et al.*

Had the distinction made by these cases occurred to our able and experienced brother, who presided at the trial, his conclusion would have been doubtless different; as it is, we think his disposition of the fund was erroneous, and the judgment rendered must be so modified as to direct so much of what remains, after paying the costs thereof, to be applied to the satisfaction of plaintiff's mortgage *fi. fa.*

Although other questions than the foregoing were pressed upon the consideration of this court with ability and learning, and with candor and fairness in argument quite noteworthy and altogether commendable, yet we do not feel authorized to determine them, because the facts contained in the record are not sufficiently full to enable us to do so with justice to the parties.

Judgment reversed.

POWELL vs. WATTS.

1. In a claim case, admissions made by the claimant to the plaintiff in *fi. fa.* concerning matters affecting the title to the property in controversy between them, were admissible; and to prove them the plaintiff was a competent witness, although such testimony involved a former conversation between the plaintiff and defendant, which was communicated to the claimant, and in reply to which it was sought to be shown that he acquiesced or made such answers, or omitted to answer when called upon to do so, as amounted to an admission
2. Whether admissions made by defendant, while in possession of land levied on and claimed, in disparagement of his title, are competent, depends, in some measure, upon the time when they were made. If made before the commencement of the plaintiff's suit, they would be admissible even in favor of the claimant.
 - (a.) In a claim case, the plaintiff in *fi. fa.* is a competent witness, although the defendant in *fi. fa.* may be dead. The latter has no interest in the issue then on trial.
3. The claimant was a competent witness, although the defendant in *fi. fa.*, under whom he held, was dead.
4. There was no material error, if any at all, in permitting claimant to testify as to his motive in purchasing the property. His disavowal of any improper purpose would be subject to correction, under the evidence going to show the contrary, under proper instructions from the court.
5. Verdicts in cases between a plaintiff in *fi. fa.*, and other parties who acquired title at the same time with the claimant, in which their property was found not subject, were inadmissible on the trial of a claim case.
 - (a.) As a general rule, where illegal testimony is admitted and afterwards withdrawn, with a caution to the jury not to regard it, the verdict will not be set aside, except in a case where it is probable that the caution was disregarded.
 - (b.) This differs from *McDonald vs. State* (last term).

April 25, 1884

Evidence Admissions. Witness. Practice in Superior Court. Before Judge HAMMOND. DeKalb Superior Court. September Term, 1883.

A *fi. fa.* in favor of F. T. Powell against George W. Watts and Edward Watts was levied upon certain land as the property of Edward Watts, and a claim was interposed

by William Watts. The *fi. fa.* was founded on an indebtedness created in 1866, and reduced to judgment in 1868. The claimant was a son of the defendant in *fi. fa.*, and claimed under a deed from his father, dated in 1867, for the expressed consideration of \$700.00. The principal issue in the case was this: Plaintiff insisted that the defendant in *fi. fa.*, being heavily in debt, had conveyed away all his lands and property to his children, except a small amount which he had since sold; that the deed to this claimant was, in fact, voluntary; and that this was done to avoid payment of debts; while claimant contended that he purchased the land *bona fide* for value.

The jury found the land not subject. Plaintiff moved for a new trial, on the following among other grounds:

(1.) Because the court, upon objection made by the claimant that Edward Watts, the defendant in *fi. fa.*, was dead, refused to allow the plaintiff in *fi. fa.* to testify to admissions made by Edward Watts while he was in possession of the land conveyed, that he had given his lands to his children, with all his property of every kind; that he had conveyed this property to his children to keep from paying the debt of one Killis Brown, for whom he was a security; and that for his debt the said Powell would have to see his children.

(2.) Because the court, upon objection of the claimant, refused to allow the plaintiff in *fi. fa.* to testify that he told claimant that his father, Edward Watts, had said he had conveyed all his property to his children to keep from having to pay the Killis Brown debt, and that he had no property left, and that he must see his children about his debt;—the court allowing the plaintiff in *fi. fa.* to testify as to what the claimant said when he was told what his father had said to the plaintiff.—The objection to the evidence was that Edward Watts was dead. [Plaintiff offered to testify that the defendant in *fi. fa.* made the statement set out in this ground; that he (plaintiff) communicated this to claimant, who responded that his father

did right in conveying his property to avoid the Brown debt. The court admitted the reply of claimant, but rejected the statements made as coming from the defendant.]

(3.) Because the court overruled the objection of plaintiff to the competency of the claimant to testify as to the consideration of the deed made by the defendant in *fi. fa.* to him, the defendant in *fi. fa.* being dead, and allowed the claimant to testify that he paid to the said Edward Watts, for the land conveyed in said deed, the consideration therein recited, in money about two hundred dollars, and the balance in work for him, after becoming of age.

(4.) Because the court overruled the objection of plaintiff, that the intention of the claimant in the acceptance of the deed to the land levied upon, from his father, Edward Watts, was irrelevant, and allowed the claimant, in answer to this question, "Do you know of any scheme on your part to defraud Dr. Powell or William Wright, in your acceptance of this deed?" to testify as follows: "When I purchased the place, I had no knowledge or thought but that it was a *bona fide* transaction as was ever made between a buyer and a seller. If I had thought anything else, I certainly would not have bought the place and paid for it."

(5.) Because the court overruled the objection of the plaintiff in *fi. fa.*, and allowed the claimant to read in evidence the original claim papers, with the findings of the juries therein, to the effect that the property levied upon was not subject in two cases in DeKalb superior court, where the execution of plaintiff had been levied upon other lands which had been conveyed by Edward Watts to his other children at the same time that the deed to the land in controversy was made to claimant. These claims, with the findings of the juries, remained before the jury for twenty-four hours, and were commented upon by counsel for the claimant in argument to the jury, and were withdrawn by the court just before the conclusion of the argument of counsel for the claimant to the

jury, and the court in his charge instructed the jury that the claim records had been withdrawn from them, and were not to be considered by them in arriving at the conclusion they might come to.

(6.) Because the verdict was contrary to law and evidence.

The motion was overruled, and plaintiff excepted.

CANDLER, THOMSON & CANDLER, for plaintiff in error.

W. L. CALHOUN, for defendant.

HALL, Justice.

1. The plaintiff in *fi. fa.* proposed to prove a conversation with the defendant which he communicated shortly after it took place to the claimant. It appeared that the defendant was dead at the trial, and on that ground the court, on direction, excluded the conversation between the plaintiff and defendant, and allowed only what was said by the claimant in reply thereto to go to the jury. There could have been no objection to the competency of admissions made by the claimant to the plaintiff of matters affecting the title to the property in controversy between them; the plaintiff was clearly entitled to it, as well as to all the conversation therewith connected. Code, §3791. This is a familiar and indisputable principle. "The plaintiff was entitled to have the whole of the conversation that took place between the parties at the time given in evidence, so that the jury might judge of its weight and effect," says Warner, C. J., in 47 *Ga.*, 147; *Ib.*, 642, 647. Had the conversation between plaintiff and defendant been reported to claimant, and had he acquiesced therein or remained silent when the circumstances required an answer or denial, this of itself might have amounted to an admission. Code, §3790. Whether this conversation was admissible, had it not been communicated to the claimant, is immaterial to the question under consideration, and so far as it

concerns that, it need not be decided. It seems that it was repeated to him shortly after it was held, and that the plaintiff was referred to him and other children of the defendant, to whom he had conveyed nearly all of his property, to make provision for the payment of his claim. It may be possible, and indeed is highly probable, that the conversation and its communication were but parts of an entire transaction, which went to make up the *res gestæ*. 51 *Ga.*, 534.

2. Whether admissions made by the defendant, while in possession of the land claimed, in disparagement of his title, are competent, would, in some measure, depend upon the time at which they were made. If made, as it seems probable they were in this instance, before the commencement of plaintiff's suit, then there would, we think, be little doubt of their admissibility (8 *Gz.*, 66, citing *Geo. Dec.*, part 1, p. 44; 20 *Ga.*, 210, 240; 28 *Id.*, 170), even in favor of the claimant; but it admits of some more question, whether, in a contest between him and the claimant, where the rights of no third party had intervened, the latter could be affected by his declarations, made possibly after he had parted with the title. Code, §3774, and citations. This, however, though insisted upon, is not the point, where the rights of a creditor are involved; the defendant is in possession contrary to the terms of the conveyance; he attempts to disclaim a title which he had when this debt was created, and the only question between the creditor and the claimant under his debtor is, whether the former has parted with, and the latter has *bona fide* acquired, title to the property on which this credit was given. The possession, coupled with declarations made under the circumstances, afford some evidence of the character of this transaction between father and son.

Conceding the competency of the testimony, however, it is insisted that, inasmuch as the party making the declarations was dead, the plaintiff could not testify as to

them. It is not disputed, where one of the original parties to the contract or cause of action in issue or on trial is dead, or where an executor or an administrator is a party in any suit on a contract of his testator or intestate, that the other party cannot testify. Code, §3854, par. 1. But it is contended that no contract or cause of action, to which the defendant in execution was one of the original parties with the plaintiff, is in issue or on trial here, at least none to which his executor or administrator could be made a party in his stead; that this is an issue between the plaintiff and the claimant alone, in which the defendant in *fa.* has none but a collateral and remote interest, if any; and that by the terms of the Code, as cited above, the plaintiff is not excluded from testifying. The case of *Anderson vs. Wilson*, 45 Ga., 25, is directly in point, and fully sustains the plaintiff's position.

3. There was no error in admitting the claimant to testify, as we expressly held in two cases, *Scott vs. Mathis* and *White et al. vs. White*, decided at the last term of the court.

4. Neither was there material error, if any at all, in permitting claimant to testify as to his motive in purchasing the property. *Brown vs. Spivey*, 53 Ga., 156, 158. His disavowal of any improper purpose would be subject to correction under the evidence in the case going to show to the contrary, under proper instructions from the court, which were doubtless given, as no complaint is made in reference thereto.

5. That the admission of verdicts in cases between plaintiff and other parties acquiring title to portions of defendant's property at the same time claimant got his conveyances, finding the property in those cases not subject, was an error, the court admitted, and endeavored, as far as he could do so, to repair any injury done the plaintiff thereby. Whether he succeeded in removing any impression prejudicial to the plaintiff may well be questioned; but as the case necessarily goes back for another hearing, and as this

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wrong, whatever it may amount to, will not be repeated, we deem any further notice of the point unnecessary. As a general rule, where illegal testimony is admitted, and afterwards withdrawn with a caution to the jury not to regard it, the verdict will not be set aside, except in a case where it is probable that the caution was disregarded. This is the extent to which a majority of this court went, in *McDonald vs. The State*, at the last term of the court.

We express no opinion as to the testimony in the case for obvious reasons, and order another trial in accordance with the principles here laid down.

Judgment reversed.

LONG *et al.* vs. HUGGINS *et al.*

1. In the grant of letters of administration, the surviving husband or wife is first entitled to letters; then the next of kin at the time of the death, according to the law of relationship and distribution, are next entitled; but if the party dies testate, the person most beneficially interested under the will shall have the preference; and, as a general rule, to cover all cases not especially provided for, the person having the right to the estate ought to have the right of the administration.
 - (a.) In case of a married woman who is next of kin, or where her letters abate by her marriage, the husband is entitled to the administration, according to the discretion of the ordinary, as between him and other persons entitled thereto under any of the prescribed rules.
 - (b.) 66 *Ga.*, 290, considered and distinguished from present case.
2. Where one as a creditor of a decedent applied for letters of administration, and upon a *carcat* being filed, the administration was claimed by the husband of the sole legatee under the will of one who had been the sole legatee of the testator, and this case was carried to the superior court by appeal, there was no error in refusing to allow persons claiming to be the next of kin of the testator, concerning the administration on whose estate the contest was had, to be made parties, all of them being non-residents of the state.
3. In order for a selection by a majority of the next of kin of a decedent of a person to administer on his estate to be admissible, they must signify their choice in writing. A selection by attorneys at

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law, claiming to represent them, was not sufficient without special authority in writing for that purpose.

4. There was no error in refusing a continuance in order to enable the applicant to procure written evidence of the choice of the next of kin. The fact that he did not expect that this would be held necessary was not such a surprise as would authorize a continuance.
5. If there were errors in the charge complained of, they were not such as materially affected the result and as would require a new trial
- (a.) This contest for administration should not be protracted so as to consume the estate.

February 19, 1884.

Administrators and Executors. Husband and Wife. Wills. Attorney and Client. New Trial. Before Judge HUTCHINS. Hall Superior Court. August Term, 1883.

Reported in the decision.

W. L. MARLER; G. H. PRIOR; GEORGE E. LOOPER; CLAUD ESTES; H. H. PERRY, for plaintiffs in error.

S. P. THURMOND; S. C. DUNLAP, for defendants.

HALL, Justice.

Riley Garrett, of Randolph county, in this state, on the 18th day of January, 1844, executed his last will and testament, whereby he appointed Isham Wheelus his executor, and gave all his worldly estate to William Augustus Wheelus. The testator died in Hall county in the year 1880. The executor named in his will died before him, but William A. Wheelus, the legatee therein mentioned, survived him. William A. Wheelus died shortly after the testator, and by his will bequeathed his entire estate to his wife, Susan A. Wheelus, who has since married Hugh H. Huggins. The testator was illegitimate, and never having married left no descendants. His nearest of kin capable of inheriting his estate were certain first cousins *ex parte materna*. When he died, he was in debt to Henry J. Long \$25.00, and Long took letters of administration *ad colli-*

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gendum upon his estate, and advertised for permanent letters. This latter application was caveated upon the ground that there was no intestacy. The will was presented for probate, and after a protracted contest, was finally established. At the testator's death, he was possessed of a large estate, consisting of personal property, worth between \$15,000 and \$16,000, and real estate, situated in Hall and Gwinnett counties, then worth between \$5,000 and \$7,000, which was acquired subsequently to the execution of his will. This latter was claimed by his heirs at law, who joined with Long in this contest for the administration. Susan Huggins claimed the entire estate, both personalty and realty, and on this ground selected her husband to administer, who made application for letters of administration with the will annexed. Both Long's application for letters of administration, and Huggins's for letters, with the will annexed, were carried by appeal to the superior court. The former was tried, and after much conflicting testimony, the issue, under the rulings and charges of the presiding judge, was found in favor of Huggins, and administration, with the will annexed, being awarded to him by the judgment of the court, thereupon Long moved the court to set aside this judgment, and grant him a new trial, not only upon the customary and usual grounds found in such motions, but upon others, excepting to various rulings and charges of the court, which motion, after being considered, was overruled, and the new trial refused, to which Long excepted and brought the case here by writ of error. The following are the grounds of the motion material to be considered:

(4.) Because, on the hearing of said case, and both before and after the interrogatories of S. P. Huggins, and G. W. Webb, and Sarah Garrett, and T. B. Brown, W. G. Brown and Elizabeth Clark were read, a paper, of which the following is a copy, and which had been filed with the pleadings in said cause in office, in open court, was pre-

sented to the court by the attorneys whose names appear thereto:

“And now in the within case comes Wesley Garrett, H. W. B. Garrett, Thomas B. Garrett, J. A. Garrett, Malinda Buster, Minerva A. Hulgin, M. B. Garrett, Thomas B. Brown, William G. Brown, Elizabeth Clark, Thomas J. Garrett, Matilda C. Phillips, Sylvia A. Rook, and say they are next and nearest of kin of said Riley Garrett, deceased, and they and each of them select Dr. H. J. Long, of Gainesville, Hall county, Ga., as a fit and suitable person to take the administration, with the will annexed, of said deceased, and they pray that he be appointed such administrator, and pray to be made parties to this case.

GEO. K. LOOPER,
CLAUD ESTES,
W. L. MARLER,
H. H. PERRY,
G. H. PRIOR,

Attorneys for next of kin of Riley Garrett, deceased, and the above named parties.”

The original of the above was attached to the pleadings in the case on trial and marked, “Filed in office, August 23, 1883. Wm. B. Smith, Clerk,” said paper being filed when the trial of said case had just begun, but before any evidence was introduced. Said attorneys then and there, in open court, made application to the court to pass the following order appended to the above paper: “Upon motion of counsel for the above stated parties, it is ordered that they be made parties to said case,” which motion or application was made both before the introduction of evidence, and after the interrogatories of S. P. Hulgin, G. W. Webb and Sarah Garrett, T. B. Brown, W. G. Brown and Elizabeth Clark were read and put in evidence; but the court refused to pass or grant said order. And the movants in this motion say that the refusal of the court to pass said order was error, and make this a ground of this motion for a new trial.

(5.) Because, on the trial of said case, after the interrogatories of S. P. Hulgin, G. W. Webb and Sarah Garrett, T. B. Brown, W. G. Brown and Elizabeth Clark were read, counsel for applicant offered in evidence, and proposed to

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read to the jury, the original of the paper set out in the fourth ground above; which paper had been marked filed in office before being offered in evidence.

Which paper, counsel stated, was offered to show that the parties therein named had selected H. J. Long to be appointed administrator. This paper was ruled out, and not allowed to be read in evidence.

Counsel for applicant then offered in evidence the original, of which the following is a copy :

“In re application of Henry J. Long for permanent letters of administration upon the estate of Riley Garrett.

We, the undersigned, the first cousins and next of kin at the time of his death, according to the laws of the state of Georgia, declaring relationship and distribution of Riley Garrett, deceased, who died in Gainesville, Ga., in the year 1880, do hereby agree upon and select Henry J. Long, of Gainesville, Hall county, Ga., to act as administrator, and to be appointed permanent administrator upon the estate of said Riley Garrett, deceased, the said Henry J. Long to give the bond and take the oath required by law.

H. W. B. GARRETT,
THOS. B. GARRETT,
J. A. GARRETT,
MALINDA BUSTER,
MINERVA A. HULGIN,
M. B. GARRETT,

By GEO. K. LOOPER, their attorney at law.

THOS. B. BROWN,
WM. G. BROWN,
ELIZABETH CLARK,

By their attorney at law, G. H. PRIOR.

THOS. J. GARRETT,
MATILDA C. PHILLIPS,
SYLVIA A. ROOK,

By their attorney at law, G. H. PRIOR.”

This paper was objected to and ruled out as to signatures of H. W. B. Garrett, Thos. B. Garrett, J. A. Garrett, Thos. J. Garrett, M. C. Phillips, Sylvia A. Rook, Malinda Buster, Minerva A. Hulgin and M. B. Garrett.

The execution of both the above papers was not disputed, and the attorneys who signed said papers were in

open court and testified to their signatures to the same, but the court excluded the papers, on the ground that the selection of a person to be administrator by those interested in the estate must be in writing, and must be signed by the heirs or next of kin themselves, or by some one specially authorized to sign for them, and that this authority must be in writing.

The court then heard the following testimony, which was offered by the movant on the *voire dire*, as to the authority of counsel to sign for the parties for whom they appeared and was before the court alone.

George K. Looper, Esq., being sworn, stated that he had been employed by H. W. B. Garrett, Thomas B. Garrett, J. A. Garrett, Malinda Buster, Minerva A. Hulin, and W. B. Garrett that he appeared as their attorney; that he had signed the papers, offered in evidence as their attorney at law; that, while they had not specially authorized him to sign said papers, they had authorized and employed him to take all steps which he thought proper to secure and collect their shares or interests in the estate of Riley Garrett; to appear for them in all courts; that their interests had been left in the entire control of himself and Estes & Son, with full power and discretion to act for the parties he had named in all matters affecting their interests or rights in the Garrett estate; that two or three of the said parties, three of the Garretts, had been to Gainesville to see him; that they had talked with him about the administration upon the estate, and had told him that they preferred that Dr. Long should administer upon the estate of Mr. Garrett in preference to the Wheeluses; that they had seen him and talked with him, and ascertained his position here, and were perfectly satisfied that he should have charge of the estate as administrator.

Claud Estes, Esq., testified that, together with Mr. Looper, he and his father, John B. Estes, under the firm name of J. B. Estes & Son, had been employed to represent the same heirs and parties mentioned by Mr. Looper; that

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they, John B. Estes & Son, were also separately employed by another heir, Wesley Garrett; that he had signed the first paper above set forth as attorney for all these parties, including Wesley Garrett; that the employment by Wesley was in writing, but was among his father's papers, who was absent holding court in Walton county, and was not accessible to him; that with regard to all they represented, they had been employed to appear for them in all courts, in any and all proceedings affecting their right, or interests in the estate of Riley Garrett, deceased, and to take all steps and any steps which they deemed right and proper to protect and secure their interests in said estate; and that he certainly construed that authority to empower him to appear for them in this proceeding, and join for them in the selection of an administrator, as their entire rights and interests had been left in the full control of said attorneys.

H. H. Perry testified that he represented, together with Mr. Prior, Thomas J. Garrett, Matilda C. Phillips, and Sylvia A. Rook, and that the paper admitted in evidence and signed by them had been sent to him by them in due course of mail.

G. H. Prior, Esq., testified that he had received a letter from Thomas B. Brown, William G. Brown, and Elizabeth Clark, specially instructing him to sign their names to the selection of Henry J. Long to be administrator, but the letter he was not able at that moment to find.

After hearing the foregoing statements, the second paper above set forth in this ground of motion was then admitted as to the signatures of Thomas B. Brown, William G. Brown, and Elizabeth Clark, but the first paper set forth in this ground of the motion was entirely excluded by the court, and the second paper was expressly excluded as to all the signatures, except those of Thomas B. Brown, William G. Brown, and Elizabeth Clark; and the jury were so instructed; and movants say said ruling excluding said papers was error.

(6.) Because, upon the ruling of the court in the preceding ground of this motion set forth, counsel for the parties claiming to be next of kin proposed to make a selection of Dr. H. J. Long to be administrator before the jury *ore tenus*, and to state to the jury that they selected Dr. Long to be administrator as counsel for the parties they represent, to-wit: H. W. B. Garrett, Thomas B. Garrett, J. A. Garrett, Malinda Buster, Minerva A. Hulin, M. B. Garrett and Wesley Garrett, and offered to prove by Geo. K. Looper, Esq., and Claud Estes, Esq., that, as attorneys for said H. W. B. Garrett, Thomas B. Garrett, J. A. Garrett, Malinda Buster, Minerva A. Hulin, M. B. Garrett and Wesley Garrett, and in their names, they selected and then and there selected H. J. Long to be administrator, with the will annexed, upon the estate of Riley Garrett; but the court refused to allow said counsel to make any selection *ore tenus* of a person to be administrator, and excluded the oral evidence offered as above of Claud Estes and Geo. K. Looper, that, as counsel for the above named parties, they then and there selected Dr. H. J. Long to be administrator upon the estate of Riley Garrett, deceased, with the will annexed; but said court then and there ruled that no selection could be made or admitted unless it was in writing, which rulings, refusing to allow a selection *ore tenus*, and to admit the oral evidence of Claud Estes and Geo. K. Looper, Esqrs., as above set forth, movants say were errors, and make the same a ground of this motion.

(7.) Because, upon the ruling of the court as set forth in the preceding grounds of this motion, to-wit: the 5th and 6th grounds, counsel for the movants, to-wit: H. W. B. Garrett *et al.* stated in their place that said ruling requiring a written selection or authority by the persons interested in the estate was unexpected to them, and that their clients were non-residents of the state and not present, and moved that the case be continued, in order that they could procure the said selection or authority in writ-

ing; which motion was overruled; and movants say this was error.

(8.) Because the court erred in charging the jury “that H. J. Long, the movant and one of the applicants, bases his claim to the administration upon the fact, as he alleges among other things, that certain persons named in the petition, who he says are a majority of the next of kin of deceased, and of the distributees of the estate, had selected him to be administrator upon the estate,” and failed to state to the jury that Long also based his claim upon the fact that he was a creditor of the estate; and in no place in his charge gave in charge to the jury the principle of law, “that when no application is made by the next of kin, a creditor may be appointed,” although in this case none of the applicants for administration were next of kin to the deceased.

(9.) Because the court erred in charging the jury, “that the burden of proof is upon Dr. H. J. Long to show that a majority of the next of kin and those entitled to be distributees of the estate had selected him to be administrator, before he would have any claim to the administration by reason of such selection.”

[NOTE.—“The court also charged that if the applicant, Long, had by evidence brought himself under this rule, he would be entitled to the administration, unless defeated by another rule to be afterwards stated.

N. L. HUTCHINS, Judge.

See note appended to ground No. 14.—N. L. H.”]

(10.) Because the court erred in charging the jury, “that the selection of a person to be administrator by the next of kin, and those interested as distributees in the estate, or entitled to the estate, before it could be considered, must be a selection in writing, signed by the persons selected, or by their agents or attorneys, duly authorized in writing. You should examine the papers in evidence, and consider them in the light of the testimony, to ascertain whether or not the selection has been made by the requisite majority of persons authorized to make it.”

(11.) Because the court erred in charging, "that they must be satisfied from the testimony that the next of kin, who have made such selection in writing, if you find such selection has been made as stated, were, at the time of making it, capable of expressing a choice, that is, they were neither minors nor insane people, incapable of acting for themselves," but omitted to charge or state that the presumption was that a person is sane, unless the contrary appears.

(12.) Because the court erred in charging the jury, "that when a person dies intestate, the person most beneficially interested under the will is entitled to the administration; then the question in this case is, who is most beneficially interested under the will of Riley Garrett?"

[NOTE.—"The court added: 'It is contended by counsel for Dr. Long, the applicant, 1st, that nothing passed under Garrett's will but the personal property owned by him at the same time he executed it in 1844, and 2d, that land acquired afterwards did not pass under it,' and sustained this position as regards the land, but ruled that all the personal property owned by testator at the time of his death passed under his will.

N. L. HUTCHINS, Judge.']]

(13.) Because the court erred in charging the jury, on the question of who is most interested under the will of Riley Garrett: "I charge you that all of the personal property that Riley Garrett owned at the time of his death passed under his will to William Augustus Wheelus, and his estate is entitled to it, after the debts and expenses of administration are paid," etc.

(14.) Because the court erred in charging the jury that, "if you find the personal estate of Riley Garrett to be larger than the real estate, then inasmuch as it passed under the will to William Augustus Wheelus, and inasmuch as Mrs. H. H. Huggins is the sole legatee under the will of William Augustus Wheelus, Mrs. Huggins would be entitled to the greater portion of the estate of Riley Garrett, and would be entitled to select a proper person to be administrator upon the estate of Riley Garrett; and it

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would be the duty of the court to appoint him, if a proper person."

[NOTE.—In connection with the extracts in the three last preceding grounds, and explanatory of them, the court also charged, "the person having the right to the estate ought to have the administration, and may select a person as administrator; and if such person is otherwise qualified, he should be appointed. In order to ascertain who is most interested in this estate, you may examine the inventory in evidence, and find which passes under the will, that is, what is the value of the personal property; and what does not so pass, that is, what is the value of the land, as testified to. If you find that the personal property exceeds the land in value, inasmuch as it passed under the will to Dr. Wheelus, his estate or his legatee, Mrs. Huggins, is entitled to it, and she, as sole legatee standing in his place, would be entitled to the greater portion of Mr. Garrett's estate, and entitled to select a proper and qualified person to administer. But if the value of the land acquired since the making of the will is greater than that of the personalty, inasmuch as it is subject to distribution among the heirs at law of Mr. Garrett, if a majority of the next of kin have selected the applicant, Dr. Long, in writing, to be the administrator, the jury should find the issue for him; for if the land exceeded the personalty in value, the heirs at law would be entitled to the greater portion of the estate, and have the right to the administration.

N. L. HUTCHINS, J. S. C."]

"AT CHAMBERS, ATHENS, GA.,
November 22, 1883. }

Upon motion of counsel for movants in the above stated case, made at the hearing of the said motion, it is ordered that the foregoing amendment be allowed, and the court certifies that the statement of facts in the foregoing grounds added by amendment are true, as explained in "notes" made by me, and which are referred to as part of said motion. In relation to the papers offered as set forth in the 4th and 5th grounds, there can be no significance in the filing in office, signed by the clerk, as it was done without authority of the court, and was no part of the record. As to the omissions to charge, complained of in grounds 8 and 11, attention was not called to them at the time.

N. L. HUTCHINS, J. S. C., W. C."

1. In *Leverett vs. Dismukes*, 10 Ga. R., 98, most of the questions in controversy in the present case came before this court, and were then determined contrary to the views now insisted upon by the plaintiff in error. Lumpkin, J., after showing that by our statute the same rules obtained

in regard to the granting of letters of administration as those that regulate the distribution of intestate's estates, declared it a rule of the English law, no less than our own, that administration followed the right of distribution. Toll., 116. "And the reason given why the person having the title to the estate ought to have the administration is, because he is most interested, and will take the best care of it." 2 Eq Ca. Ab. 423, pl. 5; *Ibid*, 425, pl., 15. "So far, indeed," he continues, "is the doctrine carried, which gives the administration to the person entitled to the property, that though the statute directs the husband or wife to be preferred, yet, their claim will yield if the estate goes to other persons; as when by settlement, upon the death of the *feme*, her property is to pass to her representatives, to the exclusion of her husband, her relatives shall have the administration in preference to the husband or his representatives. Toll., 85, 116. Bay *vs.* Dudgeon, 6 Munf., 132."

In that case, as it is claimed here, the contest was between the next of kin and the party having the largest interest in the estate; there likewise it happened, as here, that the party having this interest was a married woman, who made choice of her husband to administer in her stead, and there, as here, this choice was affirmed, and the administration was granted in accordance with her selection. "If a son dies intestate, and without brothers or sisters," says this eminent jurist, "the father is entitled to the whole estate, and to administration; and if the father die before administration is granted, administration shall be granted to his representative, for the estate was an interest vested; and the court regards the property in granting administration. 11 Viner, pl., 25; Cutchin *vs.* Wilkinson, 1 Call's R. 1. This case was decided in the court of appeals in Virginia, in 1797, and resembles in principle the case before the court. For by the act of 1827 (New Dig., 294), as well as by 29 Charles II, ch. 3, (*Id.* 1129), the husband is entitled by administra-

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tion to recover all the estate of his wife, real and personal, as well as her rights and credits, and enjoy the same, without being subject to distribution. Whether he survive her or not, therefore, he is entitled to the administration, because he is to the property; and it never could be said of him that he was administrator contrary to the meaning of the act, which declares that the person entitled to the estate is entitled to the administration." . . . "It is laid down in Viner 84, (Tit. Executors) No. 7, on one authority, that when the wife is next of kin to the intestate, the husband shall not be joined in the administration with her. 12 Viner 84; Aleyn 36. But it is further said, that when the wife is entitled, and she refuses to take the administration in her own name, the constant practice is to admit the husband. Van Thunen vs. Van Thunen, 11 Viner 84, marginal note; Gibb., 203. By the act of 1828, a *feme covert* cannot be an executrix or administratrix during coverture, but her letters, when already granted, shall abate. *A fortiori*, although otherwise entitled, will they be withheld from her on account of the coverture. But in either event, the husband shall be entitled to such letters, upon his complying with the requisitions of the law. New Dig., 327. We hold these inferences to be irresistible: 1st, that by the act of 1828, a married woman cannot be the representative of an estate; and secondly, that whenever she would be otherwise entitled, and is disqualified by reason of the coverture, the husband is next entitled in preference to anybody else."

This decision has been quoted at length, not only because it is well to refer to fundamental principles and to understand how they have been applied by the venerable sages of the law, who have preceded us, and from whom we should draw inspiration and learning to guide and direct us, but because every principle there set forth, and in the acts referred to, has been embodied in our present Code, §2494, and others of a cognate character. What difference can it make, in reason or law, whether the inter-

est to be administered is derived from an intestacy or a will? The surviving husband or wife is first entitled (*Id.* sub-sec. 1), then the next of kin at the time of the death, according to the law declaring relationship and distribution, are next entitled; but if the party died testate, the person most beneficially interested under the will shall have the preference (*Id.* sub-sec. 2); and as a general rule, to cover all cases not specially provided for, the person having the right to the estate ought to have the administration. *Id.* sub-sec. 10. In the case of a married woman who is next of kin, or where her letters abate by the marriage, the husband is entitled to the administration, according to the discretion of the ordinary, as between him and other persons entitled thereto under any of the prescribed rules. *Id.* sub-sec. 9.

It is urged upon us by the able and indefatigable counsel for the plaintiffs in error, with confidence and with such force that we find it difficult to meet and overcome the conclusion to which he would conduct us, that in the latest decision of this court upon the subject, a different interpretation has been placed upon these provisions of law from that which formerly obtained. It is true that, in *Jones vs. Whitehead*, 66 Ga., 290, an opinion is expressed that the party applying for the administration, and who would claim a preference to its grant, should be the legatee under the will of the person upon whose estate the administration is sought, and must not derive that interest mediately through or from the wills of divers persons, who claim under the legatee; and while it is conceded that this rule may be in accordance with the letter of the statute, yet we think that, in a case situated as the one at bar, it would not carry out the policy of the legislature as theretofore maintained and upheld by this court. Besides, that case is, in our opinion, distinguishable from this in its main features, one of the most striking of which is that the contest there was between the next of kin, who was in addition a principal creditor, and the selected husband of

one who had no claim or interest, except through three or four successive wills, beginning with the will of a legatee in the original will, and who was not the sole beneficiary under that original will. Here the contest is between the wife of the legatee, who was made his sole legatee before the property was reduced to possession and before the will under which he took was established. The wife, although incompetent, by reason of her present coverture, to administer, yet has the power, by statute, of selecting her husband.

The parties contesting in this case were incompetent by reason of non-residence, and have no such power of selecting a person to represent them as the wife has to make choice of her husband. The party selected by them, so far from being a principal creditor, was only so to a trifling extent, and was not, in the remotest degree, as we are informed by the record, connected, either by blood or affinity, with the testator, whose estate he sought to administer, and whose will, it would seem, he lent his aid to overthrow and defeat. To prefer him to one who is the only successor of the testator's sole legatee would, as we must conclude, be a direct violation of both the reason and spirit of law, and would undermine and entirely disregard the policy of the general assembly in its enactment.

2. There was no error, under the circumstances of this case, in refusing to allow the next of kin, whom Long claimed to represent, to be made parties with him. They might have caveated Huggins' application for letters of administration with the will annexed, and thereby have become parties, but the trial was not had upon this application, but upon Long's application. They were all disqualified, by reason of their being non-residents of the state, from administering, and their only legitimate purpose in becoming applicants would have been to have the administration conferred upon some or all of them, which, as we have shown, would have been inadmissible under the law.

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3. Neither was there error in rejecting the choice of Long by such of them as did not signify their choice in writing. The law pointed out this mode of selection. Code, §2494, sub-sec. 3.

4. Nor ought the case to have been continued, to enable the applicant to procure written evidence of this choice. The fact that such an interpretation should be placed upon the law was not expected by him, only showed that he was mistaken in his view of its requirements, and did not amount to such a surprise as would justify the court in continuing the case, to enable him to get the evidence with which he should have provided himself before the trial.

5. If there were errors in the charges complained of, they were not such as materially affected the result, and would justify us in interposing and setting aside this verdict. This contest, which settles nothing but the mere right to administer, has already been unreasonably protracted. The estate should not be consumed by an attempt to control its administration, especially as there appears to be no objection to the fitness of the person upon whom the administration has been conferred to discharge its duties, and none to his responsibility. The next of kin can call him to account, when the proper time arrives, for what they claim to be entitled to, and upon such an issue the rights of all parties can be settled and adjusted.

Judgment affirmed.

CHILDs *et al.* vs. HAYMAN, and *vice versa*.

1. A suit for partition is not a proceeding *in rem*, nor is the final judgment binding on any of the co-tenants who are not brought within the jurisdiction of the court by some service of process, actual or constructive.
2. *Seemle*, that §4007, which gives to a party to the proceeding, who is a minor or lunatic having no guardian, or who is absent from the state during such proceeding, and who has not been notified thereof, the right within twelve months after coming of age, or of restoration to sanity, or of having a guardian appointed, or to such

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absent or unnotified party, to set aside such judgment upon any of the grounds upon which he might have resisted it upon the hearing, and which prescribes that if such motion to set aside is not made within that time, the judgment shall be binding and conclusive upon the minor, lunatic or unnotified party, as if he had been notified, present or free from disability, provides for the case of one who is a resident, but is temporarily absent from the state.

(a.) The bar applies to no one who was not made a party to the proceeding, and who is not thereby called upon to answer. As to such a person, the entire proceeding is *res inter alios acta*.

(b.) While §4002 of the Code is only applicable to the cases of partition by metes and bounds, where circumstances exist rendering a sale necessary to effect a partition, all the rights to object are equally reserved to the parties to the proceeding.

3. Whether the party applying for a partition, and who claims the title of his co-tenant by virtue of the sale under the judgment, and who is at fault for not giving the notice required by law, can be regarded as a *bona fide* purchaser, so that his title would not be affected by the ordering of a re-hearing on behalf of the absent or unnotified party. *Quære?*

(a.) Under such a sale, he would acquire no title to the share of any party who was not made a party to the proceeding, and who had no notice, actual or constructive, of the same.

February 19, 1884.

Parties. Judgments. Notice. *Res Adjudicata*. Estoppel. Partition. Before Judge ESTES. White Superior Court. October Term, 1883.

Mrs. E. P. Hayman (who alleged that she was formerly E. V. Patton, of Henderson, N. C.) filed her petition for a partition of certain lots of land in White county, claiming that she owned a one-eighth interest, and Childs and Nickerson seven-eighths interest.

Defendants set up the following defences:

(1.) That the land had already been partitioned and sold under a judgment at the October term, 1881, of court. [The proceeding pleaded as a former adjudication of this subject was, in brief, as follows: Childs and Nickerson applied for a partition of these same lots, alleging the following to be the tenants in common therein: J. P. Kennedy and wife, of Abbeville, S. C., owning together

one-twentieth undivided interest; Preston F. Patton, of Henderson county, N. O., five-twentieths interest; Edmund L. Patton, of Abbeville county, S. C., two-twentieths interest; J. R. Deane, of White county, Ga., one-twentieth interest; E. P. Williams, of the same county, one-twentieth interest; and petitioners, ten-twentieths interest. Service was perfected on the resident defendants, and under order of court, the non-residents were served by publication. A judgment was rendered, reciting that, it appearing that the allegations of the petition were true, and that a partition could not be had in kind, a sale by commissioners was ordered. This was had, and petitioners, Childs and Nickerson, became the purchasers for \$1,000.00. The commissioners made title and returned the money into court, and the court ordered that, after paying expenses, the balance be paid out to the tenants in common in proportion to their interests.

(2.) That if Mrs. Hayman has any interest, having been represented by her brother, Preston F. Patton, in the former suit, she is bound.

(3.) That they are *bona fide* purchasers under the former judgment of the court, and should be protected.

(4.) That Mrs. Hayman is barred by the statute of limitations of one year, she not having begun this proceeding until more than twelve months after the former judgment.

(5.) That she is bound to look to the money in the hands of the commissioners representing the one-eighth interest which she claims, instead of the land itself; and that this amounts to \$125.00, less a *pro rata* share of expenses.

(6.) That, at the time they bought, \$1,000.00 was the full value of the property; that they have erected substantial improvements upon it, and have also dug a ditch, conveying water through this and other lots, a distance of nine miles; that they are in no way bound to maintain this ditch for this lot alone; that it is valuable for mining purposes to other lots along the ridge on which it runs,

and is separate and distinct from the title to the land ; also, that they have paid the taxes since their purchase, and have never been reimbursed.

Defendants prayed that partition be denied : or, if another sale were ordered, that the judgment be so framed as to protect their right to the ditch and water, and that they be reimbursed the proportionate part of the taxes and improvements chargeable to Mrs. Hayman ; that, in case of a second sale, the \$125.00 in the hands of the commissioners be refunded ; and for such other and further relief as might be proper.

The case was submitted to the court without a jury, and he decreed that the application be granted that the land was not capable of division by metes and bounds on account of a mine on it, and that it should be sold by commissioners, and the proceeds be divided between the applicant and the defendants ; but that the sale should convey no title to the ditch or water in it.

Defendants excepted ; and the applicant also filed a cross-bill of exceptions to that part of the judgment in regard to the ditch and water in it.

BARROW & ERWIN, for Childs *et al.*

H. H. PERRY ; A. F. UNDERWOOD & SON, *contra*.

HALL, Justice.

By consent of the parties, this case was heard by the presiding judge, both as to the facts and the questions of law involved, and by him a judgment was rendered.

By this judgment, the lands in question were directed to be sold for a partition between the parties ; there being on them a gold mine, they could not be partitioned in kind. One-eighth of the net proceeds of the sale was awarded thereby to the petitioner and seven-eighths to respondents. The respondents were in possession of the lands and had been mining them ; and in order to do this successfully had

been compelled, at their own expense, to dig and keep open a ditch some nine miles in length, to procure water to conduct their operations. The judgment reserved to them the entire interest in the ditch and the water therein, together with the exclusive right to use the same and every part thereof. Each party excepted to this judgment, and each took thereto a separate bill of exceptions. The defendants excepted to the order for a partition, and the other party to the reservation of the ditch, etc., to the exclusive use of the defendants.

Several defences were set up to this proceeding. The right to partition the premises was denied, for the reason that the respondents held under a sale in pursuance of a former judgment for partition, in a suit between them, as the owners of one-half the lands, and other parties thereby shown to be the owners of separate shares embracing the other half, among whom was Preston F. Patton, the brother of the present petitioner, who was alleged to be the owner of 5-20ths or 1-4th of the same. The petitioner was not named in that proceeding, and was in no sense a party thereto, unless she was represented therein by her brother, the said Preston F. Patton, who was a non-resident and was served by publication of a notice. It does not appear what right Patton had to represent the present petitioner in that proceeding; it is not shown that she was then a minor or married woman, or that she and her brother derived their interest from a deceased ancestor, or how they acquired it. It is certain, however, that he does not appear as representing her in any fiduciary character whatever, but the proceeding was against him, and he was notified to answer in his individual right.

Under these facts, it is insisted that Mrs. Hayman, the present applicant, was bound by that proceeding, and that, inasmuch as she did not appear within a year and file objections to the judgment rendered therein, she is estopped from prosecuting the present suit. This is the material question in the case, and if that is determined in her favor,

she does not insist upon the writ of error sued out in her behalf.

.1 That judgments rendered in suits *inter partes* are conclusive only upon parties and privies, was not questioned by the learned counsel for the plaintiffs in error. (Code, §§2897, 3577, 3826); but he insists that this is not necessarily a judgment in a suit between parties, but if not strictly a judgment *in rem*, which is conclusive upon everybody, (Code, §3827), it is yet in the nature of such a judgment, and partakes more of that nature than it does of the characteristics of the former kind of judgments; since its principal, if not sole, purpose was to determine whether the lands sought to be portioned were so situated that they could not be divided and the respective portions of the co-tenants set apart to them by metes and bounds, and in support of his position cites the English editor's note to the Duchess of Kingston's case, 2 Smith's Leading Cases, 439, 440, marginal page, 4th American from 3d English ed., T. & J. W. Johnson, Philada., 1852. The editor is there combatting the *dicta* found in text-writers and decisions, to the effect that a judgment *in rem*, to have this conclusive character, must be the judgment of a court of exclusive jurisdiction; and he submits that the position is untenable, on the principle that it is a solemn declaration, proceeding from an accredited quarter, upon the status of the thing adjudicated upon, which very declaration operates accordingly upon the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be. As instances of his meanings, he cites the condemnation of goods in the exchequer, which not merely declares their liability to forfeiture, but also accomplishes their forfeiture, and a sentence in a prize court, which not merely declares the vessel prize, but vests it in the captors. We think this does not affect the essential distinction between these classes of judgments, from which such different effects flow. This accurate and careful annotator, in a previous portion of the same note, *Id.*,

438, 439, distinguishing judgments in *personam* from judgments *in rem*, says: "Perhaps it would be more accurate to say of the former *inter partes*, since, as will presently be pointed out more clearly, an adjudication upon the status of a particular person is as much entitled to the conclusive effect of a judgment *in rem* as is an adjudication on the status of a particular inanimate thing." "And here," he continues, "arises the distinction above adverted to between judgments *in rem* and judgments *inter partes*; the former having a conclusive effect as between all persons whatever, the effect of the latter being much more limited."

"A judgment *in rem* I conceive to be an adjudication pronounced (as its name indeed denotes) upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication." Instances are given and numerous authorities cited. See also 45 *Ga.*, 74.

A suit for partition is not a proceeding *in rem*; the process is not served upon the land, nor is the land a party defendant, nor is the final judgment binding on any of the co-tenants who are not brought within the jurisdiction of the court by some service of process, actual or constructive. Freeman's Co-tenancy, §463, and citations; 64 *Ga.*, 78; 33 *Id.*, 107.

This is the settled rule of the common law, and there is nothing in our statutes relating to partition which conflicts with it. The party applying for partition must, among other things, describe the premises to be partitioned, and to define the "share and interest of each of the parties therein" (Code, §3996), and must give twenty days' notice to the opposite parties of his intention to make the application, and if any of them reside out of the state, the court

Childs et al. vs. Hayman, and vice versa.

may order service by such publication as in its judgment is right in each case. *Id.*, §3998.

Mrs. Hayman was no party to this proceeding; no notice was served on her; though a non-resident, the publication of notice did not contain her name, nor the name of any party that represented or could speak for her as to any right or interest she had in the premises. The judgment by which it is sought to bind her was taken in a proceeding she was not called on to answer, and one in which she and her rights were entirely ignored. What does it avail the defendants in this case, that the parties to the proceeding are estopped from disputing the sale and the title of the purchasers thereunder? Those who were served are bound, but that does not bind her. 23 *Ga.*, 309, 314, 315 *et seq.*; Freeman's Co-tenancy, §168, and citations. Her interests and rights are not at all affected by the estoppel of her co-tenants. So far as she is concerned, the only effect it had was to make her co-tenant with the purchaser at this sale.

2. The same statute, Code, §4007, reserves to parties to the proceeding, where such party is a minor or lunatic, having no guardian, or where one is absent from the state during such proceeding, or has not been notified thereof, the right, within twelve months after coming of age, or after restoration to sanity, or having a guardian appointed, or to such absent or unnotified party to set aside such judgment upon any of the grounds on which other of the parties designated might have resisted it upon the hearing, as authorized by the statute; and if such motion to set aside the judgment is not made within that time, the judgment is declared to be as binding and conclusive upon the minor, lunatic or unnotified party as if he had been notified, present or free from disability. It is questionable whether this act embraces one who was not at the time of the application and the judgment a non-resident of the state; its terms would rather seem to provide for the case of one who was a resident of, but temporarily absent from,

the state. Be this, however, as it may, it is evident that the bar prescribed, if we regard the entire scope and purpose of our legislation upon this subject, can apply to no one who was not made a party to the proceeding, and who is not thereby called upon to answer. As to such the entire proceeding is *res inter alios acta*; they are mere strangers to it. Thus, upon the return of the commissioners appointed under the petition to make the division, if no objection is filed by any of the parties, it becomes the judgment of the court, and is final and conclusive as to all the parties concerned who were notified of the application and of the time of executing the writ, and if objections are filed and a new partition is awarded, to be made in the presence of the parties concerned, the new partition when returned shall be firm, good and conclusive forever against all parties notified. Code, §4002.

It is true that this section of the Code is applicable alone to cases of partition by metes and bounds. But where circumstances exist, rendering a sale necessary to effect a partition, all the rights to object are equally reserved to the parties to the proceeding, as was distinctly recognized by this court in *Tucker vs. Parks et al.*, 70 Ga., 414. This position is fortified by the requirement that the parties shall execute the title to a purchaser at such a sale, and if they fail or refuse so to do, then the commissioners appointed to make the sale, or any two of them, shall convey the premises to the purchaser, and their deed shall, in that event, be as valid and binding in law and equity as if made by the parties themselves. Code, §4005. Again, when application is made for partition, "due proof" must be made that the notice required has been given; when it is the duty of the court to examine the petitioner's title, etc., before ordering the writ to issue. Code, §3999.

3. It is conceded that, when application is made for a re-hearing by one who is absent from the state, or who has not been notified, and the re-hearing is ordered, in

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that event, these proceedings do not affect the title of a *bona fide* purchaser of a sale ordered by the court. Code, §4007. Whether the party applying for the partition, and who claims the title of his co-tenants at the sale had under the judgment, and who is at fault for not giving the notice required by law, can be regarded as a *bona fide* purchaser, may admit of question. We are clear, however, upon the principles already discussed, that, under such a sale, he can acquire no title to the share of any party who was in no sense made such to the proceeding, and who had no notice, either actual or constructive, of the same. This differs in nothing from the seizure and sale of the property of a person who is no party to the process. It is needless to remark that a sale under such circumstances could confer no title on the purchaser, for want of authority to make it. The amount paid for the plaintiff's share by these defendants is still in the hands of the commissioners, and their right to it is not contested. To recover it, they have only to apply to the court.

The judgment rendered followed necessarily from the undisputed facts.

Judgment affirmed.



THE MAYOR, etc., OF ATHENS vs. THE GEORGIA RAILROAD.

1. The municipal authorities of the city of Athens passed an ordinance that "no person or persons shall be allowed to store any guano or commercial fertilizer at any point within the corporate limits of the city of Athens without first obtaining the consent of the mayor and council." At that time, the Georgia Railroad had within the city of Athens, on the east side of the Oconee river, a depot and a building for the storage of commercial fertilizers, in which they were then stored. Subsequently the railroad company abandoned this depot and building, and moved across the river, nearer the center of the city, and at great expense erected other depot buildings and a house wherein they stored commercial fertilizers for their consignees. No objection was made to this by the municipal authorities; but subsequently they fined the railroad agent and threatened further punishment both to him and the consignees:

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Held, that the ordinance does not apply to such a store-house of the railroad; and the municipal authorities having seen the company move its depot and proceed to erect buildings, without objection or warning that it would not be allowed to store fertilizers there, they are now estopped from asserting the ordinance against the company.

- (a.) Whether the ordinance is prohibitory and in restraint of trade, and therefore contrary to public policy and void, is not decided.
2. The act of December 21, 1833 (Prince's Dig., 304), authorizing the Georgia Railroad Company to purchase all lands contiguous thereto "that may be found necessary for the erecting toll-houses, store-houses, workshops, barns, etc.," invested that company with the right to purchase land and erect store-houses in the city of Athens, and to store therein such merchandise, commercial fertilizers and other freight as was necessary for its preservation and security, and the city of Athens has no power under its municipal authority to declare such store-houses, so erected and stored with freight, nuisances, or to abate the same, or to punish the company or its servants or agents for such storage.

April 8, 1884.

Municipal Corporations. Guano. Fertilizers. Laws. Railroads. Before Judge ESTES. Clarke County. At Chambers. February 15, 1884.

Reported in the decision.

T. W. RUCKER; ALEX. S. ERWIN, for plaintiffs in error.

JOS. B. CUMMING; GEO. D. THOMAS, for defendant.

BLANDFORD, Justice.

The mayor and council of the city of Athens some years ago passed the following ordinance :

"No person or persons shall be allowed to store any guano or commercial fertilizer at any point within the corporate limits of the city of Athens without first obtaining the consent of the mayor and council."

The Georgia Railroad had at that time within the city of Athens, on the east side of the Oconee river, a depot and a building for the storage of commercial fertilizers, in which they were then stored. Subsequently, some year or two ago, the railroad company abandoned this depot

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and building, and moved across the river nearer the center of the city, and at great expense erected other depot buildings and a house wherein they stored commercial fertilizers for their consignees. The authorities of the city of Athens made no objection to this. Afterward the agent of the railroad company was fined one hundred dollars for a violation of the above ordinance; also the municipal authorities of Athens fined certain of the consignees of these fertilizers, and are now threatening to fine and otherwise punish the agents of the railroad company for a continued violation of this ordinance.

This bill was filed by the Georgia Railroad Company to enjoin this action of the municipal authorities of the city of Athens. At the hearing, the chancellor granted the injunction prayed for; the city of Athens excepted to this decree granting this injunction; and this is the complaint here for our consideration. Whether the ordinance referred to is prohibitory, and as such is in restraint of trade, and thereby contrary to public policy and void, we do not decide. But we are of the opinion that the ordinance, under the facts of this case, does not apply to the defendant in error.

The defendant in error is a public carrier, and is bound, under the law of this state, to deliver at Athens all articles of merchandise, including commercial fertilizers, which it may have received for that purpose, and it is bound to take due care of all such articles while in its possession and before delivering to the consignees, and to this end it may erect storehouses for the safe-keeping of all such goods as it cannot make immediate delivery of. This is its duty as charged by the law.

When this company moved across the river and were proceeding to erect its buildings and storehouses, then the city authorities should have notified the company that they would not be allowed to store commercial fertilizers in such houses. This was but good faith on the part of the city, as it must have known, from the past course of the

company, that such was the intention of the company by the erection of a storehouse, the defendant in error being a common carrier, and having in the past transported large quantities of commercial manures, and that large storehouses were necessary for the proper protection of the same. The plaintiff in error must have known what the purpose and objects of defendant in error were in erecting the large storehouse in which it stored such fertilizers. Such being the presumption, and no note of warning being given defendant in error that it would not be allowed to store these fertilizers in such storehouse erected by it, the plaintiff in error is now estopped from claiming and asserting the ordinance against the defendant in error. We think it quite clear that it was never intended by this ordinance to prohibit the storage of fertilizers by railroad companies for their consignees.

The act of the legislature, approved December 21, 1833, (Prince's Digest, p. 304), which authorized the Georgia Railroad Company to purchase all lands contiguous thereto "that may be found necessary for the erecting toll-houses, storehouses, workshops, barns, etc.," invested this company with the right to purchase lands and erect storehouses in the city of Athens, and to store therein such merchandise, commercial fertilizers and other freight as was necessary for its preservation and security, and the city of Athens has no power, under its municipal authority, to declare such storehouses, so erected and stored with freight, nuisances, and to abate the same, or to punish said railroad company, or its servants or agents, for so doing. The exercise of the right to store freight of any kind by the defendant in error in such storehouses or barns as may have been erected by it, is in accordance with its charter, and no municipal corporation has the right or power to interfere therewith, and in so far as the city of Athens sought to interfere with this privilege thus granted to the Georgia Railroad, all such acts and ordinances are void.

Let the decree granting the injunction in this case stand affirmed.

WARE vs. BLALOCK *et al.*, administrators.

1. The affidavit to foreclose a landlord's lien for supplies in this case showed all the facts necessary to constitute a lien under the Code. It set out fully the relation of landlord and tenant, and stated that the landlord furnished the tenant with supplies to make a crop for the year 1882. It also stated the amount claimed, the demand on the owner and refusal to pay, after the debt became due.
2. It is not necessary, in an affidavit to foreclose a landlord's lien for supplies furnished, to set out the property on which the lien is claimed. Execution is to be issued against the property subject to the lien; and the law specifies that the property so subject is the crops raised during the year when the supplies were furnished.

March 18, 1884.

Landlord and Tenant. Liens. Pleadings. Executions.
Before Judge HARRIS. Fayette Superior Court. September Term, 1883.

Reported in the decision.

ROAN & ROSSER, for plaintiff in error.

C. W. HODNETT; J. T. SPENCE; VAN EPPS, CALHOUN & KING, for defendants.

BLANDFORD, Justice.

The questions in this case arise from the following affidavit to foreclose a landlord's lien:

"GEORGIA—Fayette County.

In person came A. O. Blalock, one of the administrators of Z. B. Blalock, deceased, who upon oath says that I. E. and A. O. Blalock are the administrators on the estate of Z. B. Blalock, deceased, of said county, and say that Solomon Whatley is tenant to them in said capacity of administrators, having rented the place known as the White place, in the 549th district of said county, and that as such tenant he is indebted to the said I. E. and A. O. Blalock, administrators, in the sum of fifty-eight dollars and twenty cents, which amount has fallen due within the last twelve months and is now passed due and unpaid, and that demand has been made on said Whatley by deponent since the same fell due, and that he refused to

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pay the same, and that it is now unpaid. That said amount is due for rations, provisions, etc., furnished said Solomon Whatley to make a crop on said place during the present year. Your deponent therefore asks that process may issue at once."

Which affidavit bears date December 2, 1882.

A writ of execution issued for the amount stated in the affidavit against Whatley, commanding the constables to levy on a sufficiency of the crop raised on said place mentioned in the affidavit to make the money claimed. Certain property having been levied on, Ware interposed a claim, which was carried to the superior court by appeal, and on the trial, claimant moved to quash the proceedings of foreclosure on the following grounds :

(1.) That the face of the affidavit does not show the relation of landlord and tenant.

(2.) The affidavit does not show that plaintiffs furnished the supplies as landlords.

(3.) The affidavit did not show jurisdiction in the justice's court to which it was returned.

(4.) It did not show that the demand made for payment was a personal demand.

(5.) Because it did not appear that the defendant refused to pay the debt after the demand was made.

(6.) That the demand was not made on Whatley as owner of the property upon which the lien was claimed.

(7.) That it did not show that there was any crop raised by Whatley, or what it consisted of.

(8.) It does not set out what property a lien is claimed on.

(9.) Because the *fi. fa.* did not issue against the crop of 1882.

The court overruled the motion, and claimant excepted and assigns error thereon.

We think that the affidavit itself answers all of the objections urged against it, from one to seven. The only serious question is, was it necessary to specify the crop upon which the lien was claimed in the affidavit? Code,

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§1978, says that, "Landlords furnishing supplies, money, farming utensils or other articles of necessity to make crops . . . shall have the right to secure themselves from the crops of the year in which such things are furnished with the following conditions :

" 1. The liens provided for in this section shall arise by operation of law, from the relation of landlord and tenant, as well as by special contract in writing, whenever the landlord shall furnish the articles enumerated in said section for the purposes therein named. The liens may be enforced in the manner provided in section 1991 of the Code."

§1991 for the enforcement of liens on personalty : " Liens on personal property, not mortgages, unless otherwise provided in this article, shall be foreclosed in accordance with the following provisions : 1st. There must be a demand on the owner, agent or lessee of the property for payment, and refusal to pay, and such demand and refusal must be averred. 2d. It must be prosecuted within one year after the debt becomes due. 3d. The person prosecuting the lien, either for himself or as administrator, etc., shall make affidavit, where the amount claimed is under one hundred dollars, before a justice of the peace, who shall take all other steps hereinafter prescribed as in other cases in his court, which affidavit shall show all the facts necessary to constitute a lien under the Code, and such justice of the peace shall issue an execution *instantur* against the person owing the debt, and also against the property on which the lien is claimed, or which is subject to said lien, for the amount sworn to, and costs."

The affidavit in this case does show all the facts necessary to constitute a lien under the Code. The condition of landlord and tenant is fully made to appear ; the fact that the landlord furnished the tenant with supplies to make a crop for the year 1882, is plainly stated ; the amount claimed, the demand on the owner, and refusal to pay after the debt became due is averred. It is not necessary

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that the property on which the lien is claimed should be set out in the affidavit. The justice of the peace, under this affidavit, was required to issue an execution against the property subject to the lien. What property is subject? The law answers, the crops raised during the year the supplies were furnished; and this was done by the justice in this case. We are satisfied that the court did not err in overruling the objections to the plaintiff's affidavit.

Judgment affirmed.

PARTRIDGE *vs.* WILLIAMS' SONS.

1. One who takes a negotiable paper before due and without notice, as collateral security, takes it free from the equities between the parties, like a purchaser for value before due and without notice.
- (a.) The renewal of a note at the same rate of interest is not a novation. Therefore, where a collateral to secure a note was placed in the hands of the creditor, and the note was renewed at the same rate of interest and with the same parties, the debt was the same, and the collateral security remained as securing it
2. That a promissory note is deposited as collateral security for the payment of a debt on which usury was exacted, does not render the entire proceeding void, or destroy the right to collect the collateral to the extent of the principal and legal interest of the original debt.

March 4, 1884.

Negotiable Instruments. Promissory Notes. Pawns. Collateral Security. Interest and Usury. Before Judge BOWER. Dougherty Superior Court. October Term, 1883.

Reported in the decision.

G. J. WRIGHT; D. H. POPE, for plaintiff in error.

A. L. HAWES; JONES & WALTERS; D. A. RUSSELL, for defendants.

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JACKSON, Chief Justice.

Williams' Sons sued Partridge upon a promissory note for \$1,250.00, interest from date at 8 per cent. The jury, under the charge of the court, found for the plaintiffs the principal and interest. No motion for a new trial was made, but the case comes before this court upon assignments of error in the charge of the court. The facts are, substantially, that the note sued on was payable to Hartwell or bearer, and by him transferred before due to Welch & Bacon, and by them was placed in the hands of plaintiffs as collateral security (among many others), before due, to secure a large sum of money Welch & Bacon had borrowed from Williams' Sons at 1 to 1½ per cent per month interest; that Partridge had large effects in the hands of Welch & Bacon when the note fell due, and called to pay it out of these effects, but ascertained that it was out of their hands as collateral security, and it was not paid that the debt owing by Welch & Bacon was renewed to Williams' Sons, they still holding this collateral, to fall due in February, 1881; that Welch & Bacon broke in December, 1880, still in debt to Williams' Sons a large amount, and still in possession of effects due to Partridge; that when Williams' Sons renewed the note with Welch & Bacon and retained the collaterals, this among others, it was known to them and to Welch & Bacon that many of the collaterals were worthless, having been paid, but no mention was made of this note sued on here, which had not been paid.

Upon these facts the court charged the jury, and exception is taken, and error is assigned upon portions of that charge; and the question is, did the court err on any of these assignments which are material to the issue?

1. The court charged to the effect that if prior holders, the payees or those from whom the plaintiffs got the note sued on, had funds in their hands sufficient to pay it, but had not appropriated it in payment, it would not amount to payment as against a party who got the note for value

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from such holder, whether before or after due ; that there must be a payment in fact or by contract; that if defendant called on Welch & Bacon to pay the note, and was informed that it was in the hands of Williams' Sons as collateral, this was sufficient notice to him not to pay Welch & Bacon, and if he did so after such notice, he would still be liable on said note to Williams' Sons; that if Williams' Sons obtained it as collateral before it fell due, and when it fell due, defendant applied to Welch & Bacon to pay it, having funds of his sufficient to pay it, and was told it was in the hands of Williams' Sons as such collateral, and after it fell due, Williams' Sons extended the payment of the debt of Welch & Bacon to them, and in doing so, renewed the note of Welch & Bacon to them, adding interest up to date, and retained these collaterals, and no money passed between them at that time, although both thought and said that many collaterals were of little value or security, some of them having been paid, you should find for the plaintiffs; that notice that some collaterals had been paid would not be notice that any particular one had been paid; that if Williams' Sons had been notified then that this note had been paid, and the truth was it had not been paid, it would not have affected them, and if it had been really paid by defendant to Welch & Bacon at a time when defendant knew it was in plaintiffs' hands as collateral, and no longer belonged to Welch & Bacon, such payment would not affect Williams' Sons.

The portion of the charge, of which the above is the substance, is excepted to, and assigned for error, on the ground that it is not applicable to the pleadings and evidence; that a note taken after maturity is subject to all the equities between the original parties; and that a renewal of the debt due plaintiffs by Welch & Bacon, adding in the interest to maturity, and giving a new note therefor after the maturity of the note sued on, was a new contract, and the note sued on was subject to all the equities existing between defendant and Welch & Bacon at the time, whether plaintiffs had notice of them or not.

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Under the decisions of this court, and the plain statutory provision for bringing cases to this court for review, the plaintiff in error should specify clearly the errors complained of, and exception to a long segment cut out of a charge containing distinct legal positions, it has been held, does not come up to the requirement of the statute. So that the exception to this long paragraph might well be passed by without a review and decision upon it, even aided by the shorter but still heterogeneous assignments of error upon this long part of the charge. With that aid, however, it seems that the plaintiff in error seeks to make the point that, when Williams' Sons allowed Welch & Bacon to renew their note due them, although they retained this note, which had been placed in their hands originally before due, as collateral security, that then it was retained after due to secure the renewed note, and was subject to all the equities existing then between Welch & Bacon and the defendant.

But we think the mere renewal of a note at the same rate of interest is not a novation. No new party is added, and no new consideration passes. Code, §§2153, 2724, 2878; 51 *Ga.*, 177.

It follows that this collateral to secure this debt was placed in the hands of the plaintiffs before due, because the debt was the same debt; there was no novation or change in it, but a mere renewal of the identical indebtedness of Welch & Bacon to plaintiffs, to secure which the note of defendant was turned over as collateral to plaintiffs before it was due. If the plaintiffs got the note before due, of course they took it free from all defences which the defendant may have had against Welch & Bacon, and his sets-off against them cannot avail against this collateral holder without notice, before due, any more than those defences would be good against a purchaser for value, before due and without notice. Code, §2788; 3 *Ga.*, 47; 22 *Id.*, 246; 57 *Id.*, 274; 60 *Id.*, 654. Therefore, even if any portion of the long part of the charge be objectionable—which we

do not decide to be so—inasmuch as the plaintiffs took the collateral before due, the equities between defendant and Welch & Bacon will not avail against them, and the charge in substance is right.

And the second assignment of error, on the 7th segment of the charge excepted to, is the same, substantially, as ruled above, and is controlled by what has been said.

2. The next and only other assignment of error is, that the court erred in charging that the fact that Welch & Bacon were paying usurious interest to plaintiffs did not render their title to the note as collateral security of that usurious debt void. Assuredly the security is good to pay the legal part of the debt which Welch & Bacon owed to plaintiffs. Even in cases of deeds to land or other property not under the law-merchant, this court has held that, while the deed or bill of sale would not be good to pass title, if affected with usury, yet it would be good as security to pay the principal and legal interest. Williams' Sons could recover of Welch & Bacon all they owed them, except the usurious interest; and it would be strange if, when Welch & Bacon turned over to them a note with no tincture of usury in it, they could not recover from the maker of that note as much as they could from Welch & Bacon. The note, therefore, is good to be collected and applied to the payment of the principal and legal interest due plaintiffs by Welch & Bacon, all of which, it is not pretended, does not far exceed the note sued on, when stripped of all usurious interest. Eight per cent is the lawful interest, and if one take more, he forfeits the excess beyond eight per cent. Acts of 1878-9, p. 184; *Id.* 1880-1, p. 149; Code, §§2057 (a), 2057 (b).

Formerly banks forfeited the whole debt; but that penalty is now repealed. Acts 1873, p. 52; Code, §1474. See also *Caswell vs. The Central Railroad and Banking Company*, 50 Ga., 70.

The language of the Code, in respect to titles to property affected with usury, is: "All titles to property made as a

Freeman *et al.* vs. The State of Georgia *ex rel.* McDonald *et al.*

part of an usurious contract, or to evade the laws against usury, are void." That is, the entire title, the whole thing, is a nullity; but this does not apply to commercial paper, because the statute declares that the principal and legal interest may be collected, and to that extent the paper is good and valid. The section of the Code which annuls title to property is 2057 (f), and just above it, in § 2057 (b), is the rule as to what is annulled in loaning money, in commercial paper, by individuals or corporations; and that does not annul the whole contract, but restricts it to the collection of principal and lawful interest.

Under these rules of law, the facts in this record demanded this verdict, and the judgment must be affirmed.

Judgment affirmed.

FREEMAN *et al.* vs. THE STATE OF GEORGIA *ex rel.* McDONALD *et al.*

The act of 1883, which provided that, in case of contested elections for constable, corporate officers and others not provided for, testimony should be taken before some judicial officer, with notice given to the opposite party, and should be submitted to the judge of the circuit where the election took place, or of some other circuit, if he were absent or disqualified, for a decision, was not unconstitutional. The legislature was authorized to provide such a tribunal; and the act was not rendered unconstitutional by failing to provide for a trial of issues of fact by a jury.

March 4, 1884.

Constitutional Law. Elections. Courts. Before Judge CLARKE. Randolph County. At Chambers. February 18, 1884.

Reported in the decision.

W. C. WORRILL, by J. H. LUMPKIN, for plaintiffs in error.

A. HOOD, JR., solicitor general *pro tem.*; W. D. KIDDOO, for defendants.

BLANDFORD, Justice.

There was an election for mayor and council of the city of Cuthbert. Freeman having received the greater number of votes, and being the incumbent when the election was held, claimed to have been elected mayor. This was contested by McDonald, who claimed that he had received the largest number of legal votes, and claimed that he had been duly elected. Notices were given and proofs taken, as provided in section 1329 of the Code, and the same was submitted to the judge of the superior court of Randolph county, the county wherein Cuthbert is situated, and said judge decided said contest in favor of McDonald, the contestant. Notwithstanding this decision of the judge of the superior court, Freeman refused to yield the office and turn over the papers to McDonald, the successful contestant. An information in the nature of a *quo warranto* was filed by the attorney general, in behalf of the state, upon the relation of McDonald, upon petition first filed for that purpose, by leave of the court, against Freeman, who made a response to the same, in which he insisted mainly that the decision of the judge of the superior court on the contest in favor of McDonald was wrong, first, because contrary to the evidence; and second, because the act of 1883 was unconstitutional and void, because there was no provision for trial by jury in said act, said judge acting both as judge and jury. This response or plea was demurred to by relator; the demurrer was sustained by the court, and the plea dismissed, and the court rendered a judgment of ouster against defendant in favor of relator. The respondent excepted to these rulings of the court, and error is assigned here on the same.

The act, approved September 21, 1883, provides that "in all elections for constable, corporation officers, and other officers not provided for, where there is a contest, the testimony shall be taken as prescribed in section 1329 of the Code, and be submitted to the judge of the superior

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court of the circuit in which the county where the contested election was held is located, . . . who shall decide said contest within twenty days after the same is submitted." This act provides for a special court in cases of contested election as to the offices named in the act. In our opinion, the legislature has the power, under article 6, section 1, par. 1, of the constitution of this state, to establish such a court by law. That section and paragraph of the constitution declares, "The judicial powers of this state shall be vested in a Supreme Court, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as have been or may be established by law." This, in our judgment, is a clear grant of power to the legislature to establish this particular court in contested election cases, and it having been so established, with power given to the judges of the superior courts to decide this contest between these parties, the decision must stand until reversed or set aside in the manner pointed out by law. We do not think the failure to provide for a jury to determine facts, in the act of 1883, renders the act unconstitutional. In a government where the officers are elective, it is absolutely necessary that there should be some quick and summary way to determine contests of this character; public policy requires that the machinery of the government shall be put in operation, and this might be delayed for a long or indefinite time, if left to be determined by a jury and the ordinary tribunals of the country—motions for new trial and writs of error being the consequences of such proceedings. The case of *Ewing vs. Filley*, 43 Penn. State R., 384, is a well considered case by the Supreme Court of Pennsylvania upon a statute of that state somewhat similar to our act of 1883. In that case, it was held that the act of 1839, instituting the form of proceeding for contesting elections, and depriving a party claiming a public office by a popular election of a trial by jury on the disputed facts, is not unconstitutional. This case, with others, fully sustains the constitutionality of our act of 1883.

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See McCrary on Elections, §§2888, 2889 ; 2 Par. (Penn.) 389 ; 44 Penn. St. R., 332 ; 26 Ark., 281 ; 53 Mo., 107 ; 64 *Id.*, 417 ; 52 Tex., 335 ; 42 *Id.*, 203 ; 48 *Id.*, 413.

We think that the act of 1883 is constitutional, and that the court did right in sustaining the demurrer to the pleas made by plaintiff in error, and rendering the judgment of ouster in this case ; and also in the case of Allison, Brooks and Gillispie *vs.* Denard, Crozier and Stanford. Let the judgment be affirmed in both cases.

Judgments affirmed.

LOCKETT *vs.* PITTMAN.

1. In a suit for treble damages on account of the killing of a cow by the defendant's overseer, evidence that the "working boss" had said that his orders were to kill all people coming on the place, was hearsay and irrelevant.
2. A principal is not liable for the wilful trespass of his agent, unless done by his command, or assented to by him, except as to domestic servants ; for the torts of such servants the principal is liable, if done by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary.
- (a.) The recovery of treble damages provided for by section 1445 of the Code is penal in its nature, and will not be applied to cases not clearly within its scope and purpose.
- (b.) Whether actual damages could be recovered. *Quære?*

March 4, 1884.

Principal and Agent. Master and Servant. Damages. Laws. Before Judge BOWER. Dougherty Superior Court. October Term, 1883.

Reported in the decision.

D. H. POPE ; D. A. VASON, for plaintiff in error.

L. ARNHEIM, for defendant.

HALL, Justice.

This action was brought to recover treble damages, under

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the statute, for the killing of plaintiff's cow by the defendant, or by his causing her to be killed, the cow, at the time of the killing, being found within defendant's enclosure, which was not protected by a lawful fence. The evidence showed that the cow was killed in defendant's absence by his superintendent or manager, or by his orders.*

1. The court admitted evidence, over the objection of counsel, that the "working boss" on defendant's place had said that his orders were to kill all people coming on the same. This was mere hearsay testimony, and moreover, irrelevant, and should have been rejected upon the making of these objections. Code, §§3756, 3770.

2. The same witness swore that he had a cow killed there at the same time plaintiff's was killed; that he applied to defendant to pay him for her, which he promised to do, telling him that he had ordered all cattle breaking into his fields to be killed. The evidence was conflicting upon this point, as well as upon the sufficiency of the fence. The court charged the jury:

(1.) If they believed from the evidence that the agent, overseer or servant of defendant either killed, or ordered the cow in question to be killed, and that this was done by the command or order of defendant; that she was killed in his field, and it was not inclosed by a lawful fence, then the plaintiff was entitled to receive three times the amount of damage proved.

(2.) If the cow was killed in the field, improperly inclosed, either by the agent, overseer or servant of defendant, or by his orders, and the killing was done in the prosecution and within the scope of the business of defendant entrusted to said agent, etc., defendant would be liable, whether he ordered said killing or not.

(3.) That if the agent, servant or overseer of defendant, employed for the purpose of cultivating and protecting the field, killed the cow in the same, and it was not

*The plaintiff recovered a verdict and judgment for \$60.00, which was three times the alleged value of the cow. Defendant excepted.

inclosed with a lawful fence, and the killing was done for the purpose of protecting the crop growing on the field, and to prevent its destruction by the cow, then the defendant would be liable, as this would be within the scope of his business.

To these two last charges, numbered 2 and 3, the defendant excepted, and now assigns them as error, and whether the exception is well taken will depend upon the subjection of the agent or overseer to the defendant's control, and how far the principal or employer is responsible for his tort. In any event, a person is liable for torts committed by his wife, and for those committed by his child or servant, by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary. Code, §2961. It is quite evident that the association of "servant" with "wife" and "child" in this section of the Code, could have referred to no other than a domestic servant. *Noscitur a sociis*, as a rule of construction, is directly applicable. There is no other section of the Code that makes the master responsible for the voluntary tort of any other species of servant, although that tort be committed in the prosecution and within the scope of his business. The wrong-doer, in this instance, was not shown to be the domestic servant of the defendant, but it appeared that he was his agent or overseer.

Is there no difference in the liability of a person for the tort of such a servant and those of an overseer or agent? The Code, we think, makes a difference in this respect. The principal is not liable for the wilful trespass of his agent, unless done by his command or assented to by him. Code, §2204. Every agent exceeding the scope of his authority is liable for his own tortious act, whether acting by command of his principal or not; but for the negligence of his under-servant, employed by him for his principal, he is not responsible. Code, §2213. In the absence of the employer, the overseer stands in his place. It is his duty to see to the sustenance and protection of his employer's

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property, and to discharge the duty, he is justified in repelling aggressors and trespassers to the same extent as the employer. Code, §2215. It does not appear that the principal or employer is given any such right to recover damages for injuries done to his agent or overseer as is given for such injuries to a wife, child or servant, in the strict sense of that term (Code, §2960), or that either of these persons are personally responsible to others for wrongs done in the transaction and within the scope of the proprietor's business, as would be agents and overseers. These latter persons are not so dependent upon the principal or employer as are under-servants, and hence arises the difference in the principal's liability in the two cases for the wrongs done to others. The difference may not be readily perceived, but still it results from the different terms employed in fixing the liability in each case.

As this is a proceeding under section 1445 of the Code, which is highly penal in its character, and which should not therefore be applied to cases not clearly within its scope and purport, if not within its letter, we are inclined to the opinion that the charges excepted to in this case were too broad and unguarded, and think they should have been qualified and limited to the extent indicated above.

Perhaps a recovery for the actual damages proved in this case might have been sustained, upon the evidence disclosed by the record, but beyond this, we do not think the finding should have gone, unless the jury were satisfied that the alleged wrongs were done in pursuance of the defendant's command.

Judgment reversed.

BLANDFORD, J., concurred.

JACKSON, Chief Justice, concurred *dubitante*.

Roberts, for use, vs. Davis.

ROBERTS, for use, vs. DAVIS.

1. False and fraudulent representations as to the validity of the title to personalty, acted on by another to his injury, will estop the maker of them from setting up title to the property.
2. False representations as to the validity of the title to personalty having been made to one who had purchased it and was about to sell it; and acting upon such representations, he having sold and warranted the title to his vendee, in an action of trover by the maker of the representations against the last purchaser, the former would be estopped from asserting his title.
3. Although the representations were made after the party to whom they were made had purchased the property, yet, it appearing that the vendor under whom he held had sufficient means to make his warranty good, and that the holder of the property failed to secure himself, but aided the person making the representations in obtaining a bill of sale of the seller's property, such facts constituted an injury to the holder of the property which would work an estoppel upon the other party.
4. A consideration is valid, if any benefit accrues to him who makes the promise, or any injury to him who receives it.
5. While the evidence is conflicting, it is sufficient to sustain the verdict.

March 11, 1884.

Estoppel. Fraud. Vendor and Purchaser. Contracts. Consideration. Before Judge SIMMONS. Houston Superior Court. October Term, 1884.

Roberts brought trover against Davis to recover a mule. The case was carried to the superior court by appeal. It was so amended as to be in the name of Roberts for the use of Bryan. The defendant filed the following pleas:

(1.) The general issue.

(2.) That Roberts had sold the mule to one Washington, taking a note from him for \$115.00, and retaining title until paid for, and Bryan was security on the note; that Washington paid \$40.00 on the amount, and then traded the mule to one Tharpe, who traded it to one Taylor, and he, in turn, traded it to defendant; that neither Tharpe, Taylor nor defendant had notice of the claim of Rob-

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erts; that after defendant traded for the mule, Taylor, hearing of the claim of Roberts, went to see Bryan about it, and caused Washington to turn over certain property to Bryan for the purpose of saving him harmless on account of his suretyship; that Bryan accepted the property for that purpose, paid the balance due to Roberts, and informed Taylor that the note had been paid, the suit settled, the claim of Roberts released, and the title freed from all claim on the part of Roberts, Bryan or Washington; that Taylor communicated this fact to defendant, and he therefore filed no plea, believing the case to have been dismissed; that Bryan nevertheless appeared in court, and testified that the title was still in Roberts, but in fact the claim was fully paid off and discharged before the trial.

It is unnecessary to set out the evidence in detail, the material portions of it being stated in the decision.

It is only necessary to state that Taylor testified that Washington had sold the mule to Tharpe, and Tharpe had sold to witness, and the latter was negotiating the sale to defendant at the time of the conversation. etc., with plaintiff set out in the plea.

The jury found for the defendant.

Plaintiff moved for a new trial, on the following among other grounds:

(1.) Because the court charged as follows: "If you should believe from the evidence that, before J. W. Taylor traded the mule in dispute to Davis, the defendant, Taylor went to J. S. Bryan, the usee, to see about what kind of a lien there was on the mule, and Bryan told Taylor he would be safe in trading, then you should find for the defendant."

(2) Because the court charged as follows: "If, before Taylor traded the mule in dispute to defendant, Bryan told Taylor he was safe in trading, though Bryan then had no title or lien on the mule, and subsequently acquired the title by paying the Roberts note, you should find for the defendant, on the same principle that the law will not

let a man stand by silent and see another purchase his property and not disclose the title."

(3.) Because the court erred in the whole charge to the jury.

(4.) Because the verdict was contrary to law and evidence.

The motion was overruled, and plaintiff excepted.

B. M. DAVIS, for plaintiff in error.

DUNCAN & MILLER; R. N. HOLTZCLAW, for defendant.

JACKSON, Chief Justice.

The facts of this case, either undisputed or as related by the witnesses of the defendant, are substantially these: An action of trover was brought by Roberts, who retained title to the mule sued for in this action until he was paid the purchase money therefor; Bryan was responsible for the purchase money, with a negro, Washington, who got the mule; Roberts had retained title to protect Bryan, and at his instance, and instituted suit for the mule in order to get his money. Bryan paid the balance of the note, and Roberts disclaimed title, being no longer interested, having got his money, and by order of court, this action of trover proceeded in the name of Roberts for the use of Bryan. The consideration which passed to Roberts for the mule was a note signed by Washington and Bryan for \$115.00, and title was retained until the note should be paid, which is in evidence; pending the action of trover, brought, it seems, to get a balance of seventy-five dollars due on this note, Roberts having left it for collection in his attorney's hands, Bryan paid the \$75.00 and took this receipt:

"Received of J. S. Bryan the sum of seventy-five dollars as payment for a mule sold by me to John Washington, I, Roberts, retaining title to said mule for purchase money, said Roberts binding himself to transfer the title to said mule to said Bryan, when he shall

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recover said mule, in his action of trover now pending in the county court of Houston county. December 19th, 1879.

(Signed)

W. L. ROBERTS,
Per Davis & Riley,
Attorneys at law for Roberts."

Before this action was brought, Washington sold the mule to Tharpe, and Tharpe to Taylor; and Taylor being about to sell to Davis, the defendant, hearing that there was some cloud on the title, in possession of Bryan, before he consummated that sale, called on Bryan, whom he told of his purpose to trade the mule to defendant, and inquired about the title, when Bryan told him he could safely trade, as Washington had enough to pay for the mule, and asked Taylor if he could not fix up a bill of sale, so that he could control what Washington had. Taylor told him that, if he would send Washington over to him, he would arrange it. Next day Washington came, and Taylor drew up the papers, and asked Bryan next day if he had got the papers; he said yes, and that he was perfectly satisfied. When the trover suit was commenced, Taylor went to see Bryan, to have him pay the note and stop it, which he promised to do, and afterwards told him he had taken up the note and stopped the suit, and that he, Taylor, ought to pay part of the cost, as he, Bryan, had settled the suit, and that he need not attend the court. Taylor refused to pay the cost. Heard by accident that the judgment recovering the mule had been rendered, and appealed to the superior court.

The court below held that these facts, this conduct of Bryan, if the jury believed the facts testified to be true, would amount to an estoppel upon Bryan from claiming title to the mule. Charging the jury to the effect that, if Bryan told Taylor that he might safely trade the mule to defendant, before he had completed the sale to him, when Taylor went to him and asked him about any title or lien he had on the mule, telling him of the contemplated trade to defendant, and that, if at that time Bryan had no title, it would make no difference if subsequently he acquired title, he would still be estopped; applying to the case,

under the facts, if believed, the well settled principle that one cannot stand by and see another purchase property in silence, when he has a title to, or lien thereon, without disclosing to him the fact.

Construing this charge in the light of the facts disclosed in this record, we think that it hardly gives the law as strongly as it is on those facts against the plaintiff in error. These facts, if believed by the jury, show fraud to such an extent that no court would allow a suitor to set up title under such circumstances. They amount to an estoppel *in pays*. The point is covered by the Code, §§2966 and 3753. The former contains the principle applied by the court below, the doctrine of silence when honesty demanded disclosure. So that if the plaintiff, Bryan, had failed to speak, when Taylor asked him about his title or lien, and had permitted him to sell to defendant, he would have been estopped; and, if subsequently he converted the lien which he had then into a title, he would be equally estopped *ex equo et bono*, in all equity and good conscience.

But how much stronger than mere failure to tell the truth are the facts told by Bryan here to Taylor. He tells him that Washington has enough to pay the note; he gets him to procure a bill of sale or lien on Washington's property, which he said was sufficient to pay the note and remove the cloud off the title to the horse; he expresses himself perfectly satisfied, and acknowledges the receipt of the paper Washington gave him, procured by Taylor to secure the note, and when Taylor hears of the suit in trover for the mule, and calls on him to settle the note, he tells him he has done it and that the case is settled, and asks him to help pay the costs, and all this is done in the face of an arrangement he has made with Roberts's attorneys to carry on the suit, and make him a title to the mule, when Roberts gets a verdict and judgment for the mule. Surely, in the language of section 3753 of the Code, this conduct makes a case of admissions on which Taylor "acted," both "to his own injury" and Bryan's "benefit,"

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and the case is one "where it would be more unjust and productive of more evil to hear the truth than to forbear the investigation."

No court would allow title to be set up in the lurid light of a fraud so foul.

But it is argued that Davis, the defendant, was not present, and that he did not purchase under the deception practiced by Bryan; but the reply is, that he stands in Taylor's shoes. Taylor warrants title to him. Taylor himself is directly interested in this trover case, because he must make good the title to Davis, and Taylor would be badly hurt by the conduct of Bryan in thus deceiving him.

But the able and ingenious counsel for plaintiff in error argues further, that Taylor had already bought from Tharpe and Tharpe from Washington, when these representations were made by Bryan, and the bad title was in him then, and Bryan's deception made it no worse for him. The reply is conclusive, that Taylor could then have protected himself from Washington. If Washington had effects enough to satisfy Bryan, he had enough to make good the mule to Taylor; and if Taylor had the influence with Washington to induce him to secure Bryan, he would have had enough to get him to secure himself; but relying upon Bryan's representations and assurances, he did have him, Bryan, secured, and left himself nothing but those representations and assurances, to make his own warranty of title good to Davis.

The indefatigable and suggestive mind of counsel falls back upon another position, and takes ground that no consideration passed from Taylor to Bryan to make these promises available in law, but they are at best *nudum pactum*. It may be answered that false representations or admissions on which others act need no consideration; certainly none other than action to one's injury, caused by them, or action beneficial to the party making them on the strength of the representation. We have seen that both of these results followed from the representations of Bryan.

And these will support any contract. The Code, section 2740, declares that "a consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise." In the case at bar, there was real service done, *a quid pro quo*. Taylor got Washington to secure Bryan, and Bryan expressed himself satisfied with that consideration.

If Taylor's version of this affair be correct, and there is plenty of evidence to sustain the jury in finding for that version, then it would be simply iniquitous, nakedly leprous, to allow Bryan to recover the mule. And he is the real plaintiff. Roberts disclaims title and the suit in trover, and his name is used for the benefit of Bryan only. It is true that the evidence is conflicting, but the jury has settled the conflict. The charge gave the issue to them, and the court below, on the motion for a new trial, exercises his discretion to let the verdict stand. It is sheer effrontery to say that it was abused. On the contrary, this verdict, piled upon that of another jury, ought to stand.

Judgment affirmed.

HUGGINS *et al.* vs. HUGGINS *et al.*

[This case was argued at the last term, and the decision reserved.]

1. One item of a will was as follows: The residue of testator's estate should "be distributed equally among my following grandchildren, to-wit: The children of my deceased daughter, Isabella Frances McClendon, Mary, Joseph, Lula, Sabra and Bettie; the child of my deceased son, John Huggins, Caledonia; the children of my deceased son, James Lewis Huggins, Wellborn, Joseph and Susan," etc., naming grandchildren as children of others of the testator's children dead and living. It then provided that this item should embrace all notes, accounts, cash and other property on hand at the time of his death, "to be equally divided among my grandchildren above mentioned, except that \$800.00 is to be deducted from the amount I have willed to the children of my deceased son, Hastings Young Huggins, the amount of \$800 00 having been advanced by me to my son, Hastings Young Huggins, during his

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lifetime." In another item he gave \$10.00 to grandchildren, naming them, children of a named son and daughter in Texas :

Held, that the residuary legatees took *per capita* and not *per stirpes*.

2. To such a will the following codicil was made: "I further desire and direct that my son, Aaron Edwin Huggins, who is now absent, and it is not known by me whether he is alive, that, in the event he should return, he shall receive an equal share with my above named heirs, viz.: William Bluford and Asa Mitchell Huggins." In the will nothing was left to the two sons named, but their children were among the residuary legatees :

Held, that this codicil did not operate to change or affect the will, so as to make the residuary legatees take *per stirpes*, but only provided for the absent son, should he return alive.

February 19, 1884.

Wills. Estates. Before Judge HARRIS. Carroll Superior court. April Term, 1883.

William B. Huggins, executor of Asa Huggins, deceased, filed his bill in 1880 for a construction of the will of his testator, the material parts of which are set out in the decision. He alleged that he had eleven children, and Asa M. Huggins, another son of the testator, had only one; but the latter insisted that the children took *per stirpes* and not *per capita*, and that his one child was entitled to as much as the eleven of complainant. There was some parol evidence to the effect that the testator stated that he was not satisfied with his will; that he desired his son, Edwin, if he should return, to have an equal share in his estate with William B. and Asa M.; that he thereupon obtained one Simons to write a codicil, and the latter wrote it in the language of the testator. Edwin was last heard from in Nebraska, 1866, and subsequently a man with whom he lived wrote that he had started for home. He has not since been heard from.

The court held that the grandchildren of the testator took *per capita*, and decreed accordingly. Defendants moved for a new trial, which was refused, and they excepted.

W. A. TURNER, for plaintiffs in error.

MERRELS & BURCH; ORLANDO MCLENDON, BREWSTER & BUCHANAN; JOHN S. BIGBY, for defendants.

JACKSON, Chief Justice.

Only one question is made before us by the counsel for the plaintiffs in error, and that is, whether the grandchildren named in the will take *per capita* or *per stirpes*?

By the fifth item of his will, the testator desired the residue of his estate should

“be distributed equally among my foilowing grandchildren, to-wit: the children of my deceased daughter, Isabella Frances McClendon, Mary, Joseph, Lula, Sabra and Bettie; the child of my deceased son, John Huggins, Caledonia; the children of my deceased son, James Lewis Huggins, Wellborn, Joseph and Susan,”

and so on, naming the grandchildren as children of others of his children, dead and living, and then he adds

“This item is to embrace all notes and accounts due me; all cash on hand at the time of my death, and all other property of which I may be possessed at the time of my death, to be equally divided among my grandchildren above mentioned, except that eight hundred dollars is to be deducted from the amount I have willed to the children of my deceased son, Hastings Young Huggins, the amount of eight hundred dollars having been advanced by me to my son, Hastings Young Huggins, during his lifetime.”

By the 6th item, he gives ten dollars to grandchildren, naming them, children of his son, Jephtha, all in Texas and by the seventh, ten dollars to the children, naming them, of a daughter, Elizabeth Swinny, also all in Texas, mentioning also, in this last item, a child of hers, whose name he does not know.

1. There can be no doubt that these grandchildren, named in the fifth item of the will, were designated and intended by the testator to take, as residuary legatees, equally, all the estate left in that item, *per capita*. After expressing a wish that the property mentioned in the item be equally divided among them before naming them, he adds that it

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is to embrace notes, accounts, all cash on hand at his death, and all the property he may be then possessed of, and all this property is "to be divided equally among my grandchildren above mentioned," thus clinching the nail and fastening his intention that it shall be divided *per capita* among them.

Then follows the exception of the children of one son, who are to receive eight hundred dollars less than the others, because their deceased father had been advanced that sum. Hence it is presumed he directed that his grandchildren be named as the children of each son or daughter, because he wished that advancement to be accounted for by the children of this deceased son. From no mention being made of any advancement to others, the inference is that none of the other deceased parents had had advancements; and that these alone, as heirs of a deceased parent, had received *per capita* an equal portion of that advancement; and therefore, as he wished all the grandchildren named to take an equal *per capita* share of what was received from his property, it became necessary to charge these with the advancement to their father, in their hands as his heirs when the will was made. Further light is thrown on this construction of the clause by the 6th and 7th items, in which he gives ten dollars to certain grandchildren in Texas, naming them also as the children of a son and daughter there. Evidently he thought it necessary to name all his children and grandchildren, upon the idea that not to name them would vitiate his will. Moreover, these items show that the grandchildren in Georgia, those whom he knew and loved, were the objects of his bounty, and those whom he did not know, who were probably born in Texas, were not; and thus that bounty passed over the son and daughter in Texas just as it did the sons and daughters in Georgia, and lighted on the heads only of the grandchildren whom he knew, leaving out the Texas grandchildren whom he did not know.

For these reasons, it seems to us clear that this will gives

to each grandchild an equal share of this *residuum, per capita*, and without regard to whose children they were.

2. But there is a supplement or codicil to this will, and the counsel for plaintiffs in error, while conceding that, if the will stood alone, this construction put upon it is right, insists that this codicil shows that such was not the intention of the testator. The codicil is as follows:

"I further desire and direct that my son, Aaron Edwin Huggins, who is now absent, and it is not known by me whether he is alive, that, in the event he should return, he shall receive an equal share with my above named heirs, viz.: William Bluford and Asa Mitchell Huggins."

In the will, nothing is left to either of these two sons, who are his only living sons in Georgia; but William Bluford's eleven children and Asa Mitchell's one child are residuary legatees, with other named grandchildren, *per capita*, as stated above by the will. Inasmuch as neither of them get a cent by the will, we should conclude that the testator merely named him, the absent son, to show he remembered him, under the idea that this was necessary, as mentioned above in respect to those absent in Texas, and intended him to get nothing; but the parol testimony leads us to think that he may have intended him, if he ever returned, to take as much as each of his two sons named would have taken as heirs, had there been no will. In the codicil, he names them as heirs, and the codicil may have meant to give him as much as he would have got as an heir at law. But be that as it may, it seems clear that the codicil was not intended to operate so as to change or affect at all the will, but only to provide for this son, should he return alive. Counsel insists that it shows the intention to be to make grandchildren take *per stirpes*, inasmuch as reference is made to two sons, one's children numbering eleven, and the other's but one child, and the testator alluding to the shares as equal, inasmuch as he wished the absent son to have what either got. But neither got a dime as a legatee, while either would have

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got an equal share as heir; and he calls them heirs. The whole intent of the codicil was not to alter the will at all, except in so far as to provide for this absent son.

So that in any view we can take of the will, the grandchildren named take *per capita*, and the judgment is affirmed.

Judgment affirmed.

COTTLE *et ux.* vs. HARROLD, JOHNSON & COMPANY.

[Blandford, Justice, being disqualified, Judge Branham, of the Rome circuit, was appointed to preside in his stead.]

1. Where the objection to the jurisdiction of the chancellor of a different circuit from that in which a case was pending to hear an injunction was not urged, but the chancellor certifies that he understood the hearing of the case by him to be acquiesced in by counsel, the question not having been decided by the court below, is not the subject-matter of review here.
(a.) This case differs from that in 67 *Ga.*, 246, in that the record and bill of exceptions together show that the judge of the circuit was disqualified.
2. Equity will restrain a trespass when the threatened injury is irreparable in damages, or when the trespasser is insolvent, or when there exist other circumstances, which, in the discretion of the court, render the interposition of the writ necessary and proper; among which is the avoidance of circuitry and multiplicity of actions.
3. Where land was bought for a firm, paid for with the money of the firm, and the title conveyed to two of the members for the firm; an implied trust arose in favor of such firm, the members were the equitable owners and tenants in common, and could mortgage the land.
4. Under such facts, where there were five partners, four of whom gave a mortgage on property thus equitably owned by the firm, and where the mortgage was foreclosed and the land sold, if the proceedings were all regular, the sale operated to convey the interest of all the partners who joined in the mortgage, but did not pass title to the interest of the member who did not so join in it.
(a.) The lien of the mortgage antedated the deed from the two members of the firm to the defendant in this case.
5. A *fi. fa.* which has been levied, but under which no sale has been made, does not alter the title to land.
6. If, upon the dissolution of a firm, one member took certain lands

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and agreed to pay a mortgage debt thereon, but failed and refused to do so, and conveyed the land to another person without consideration, to shield himself from the payment of this and other debts assumed by him, and the grantees gave bond for titles to still another person for this purpose, and it was so received by him, these conveyances would be void.

7. The mortgage *fi. fa.* having issued against the firm, though one of the members did not join in the mortgage, and the land having been sold and conveyed as the property of the firm, and the complainants in the present bill claiming a prescriptive title, while defendant claims to be a *bona fide* purchaser for value, and denies the possession of complainants, there was no error in granting an injunction until all these questions could be determined by the jury.
8. The sale of the land under the Armstrong *fi. fa.* did not convey more than the equity of redemption. The mortgage was a prior lien thereon, and no irregularity in relation to it is shown.
9. The fact that the defendant had made a deed to the land to one of the complainants would not prevent an injunction. The complainants all suing for the use of the firm, title might be shown in them or either of them. If the deed was defendant's, it concluded her; if not, it would not affect her.
10. The judge may always correct a bill of exceptions in the body thereof, so as to make it conform to the truth, if he chooses to do so. It would be better not to interline the bill of exceptions, but to make the corrections on the margin, or on a separate piece of paper, and attach it before certifying. No alteration by the judge, certified to have been made by him, will cause a dismissal of the case, nor will an immaterial erasure or interlineation by counsel do so. Material interlineations, additions or erasures, not made by the judge or certified to have been made before the bill of exceptions was certified, will authorize this court to dismiss the case.
 - (a.) This court would not grant a *mandamus* absolute against a judge who should refuse to certify an illegible, disorderly, erased or interlined bill of exceptions.
 - (b.) The careful preparation of abstracts urged.

April 25, 1884.

Title. Liens. Partnership. Injunction. Trespass. Equity. Trusts. Tenants in Common. Practice in Supreme Court. Before Judge CLARKE. Sumter County. At Chambers. January 9, 1884.

Reported in the decision.

B. B. HIXON; C. ANDERSON, for plaintiffs in error.

Cottle et ux. vs. Harrold, Johnson & Company.

HAWKINS & HAWKINS, for defendants.

BRANHAM, Judge.

Thos. Harrold, Uriah B. Harrold and Henry R. Johnson, partners, composing the firm of Harrold, Johnson & Company, filed their bill in Sumter superior court against Obadiah Cottle and his wife, Eldora V. Cottle, claiming title to land lots numbers 160, 161, 162, parts of lots 138 and 158, in the 26th district of Sumter county, containing 1,000 acres, and known as the Joseph Brown plantation, alleging that Albertus L. Beckwith was in possession of the land as their tenant, and that the defendants, in December, 1883, in the night, under some pretended but fraudulent claim, seeking to get possession of the land, moved into a one-room out-house in an oat-field, remote from the dwelling, and now claim to be in possession of the land, are taking water from the fish pond, cutting wood from the place, and are threatening to interfere with the tenants, to dispossess them, and will likely so interfere with them that they will be unable to keep them on the farm, and that the defendants are insolvent; and they therefore pray that they be enjoined from using water and wood on the place, from injuring the crops, from interfering with their possession and with their tenants in any way.

The defendant O. J. Cottle claimed no title to the land, but alleged that the title was in his wife, Eldora V. Cottle. She claims that she bought the land, in 1871, from Aaron T. Hart and Isaac Hart; that they then made her a deed to it, and that she then went into possession and sold it to Hansel Beckwith, in 1873, for 160 bales of cotton, gave him her bond for titles, which Hansel still has in his possession, put him in possession of the land, and that he held the whole of it as her tenant until the latter part of 1882, when he let his son, Albertus, without her consent, into the possession of the dwelling house; that Albertus is colluding with complainants, is holding for them, and seeks

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to deprive her of her right to the land. She says Hansel has never paid her for the land, and has never repudiated the contract, and that the bond for titles made by complainants was made after she had given Hansel her bond, and while he was in possession under her. She denies the possession of complainants, and that they have any perscriptive title to the land. She admits her insolvency, unless she is the owner of the land. The bill of exceptions comes here under a pauper affidavit. The defendant did not produce any deed to herself, because she says she was unable to find it, and that she gave it to Hansel Beckwith with the other back deeds to the land, which complainants have, and which she claims as her papers, to be used on the hearing of a bill filed by him against Samuel H. Hawkins.

The complainants produced on the hearing the three back deeds referred to, made in 1868, conveying the land to Aaron T. and Isaac Hart, and also a deed from I. N. Hart to Allen Fort, conveying his interest or claim in the land, made in 1875, and Fort's quit-claim deed to them. These deeds are not very material to the questions involved. The complainants rely upon the following as their paper title, to-wit: A mortgage, dated May 9th, 1870, from I. N. Hart, Samuel G. Hart, Aaron T. Hart, and D. F. Hart, partners, composing the firm of I. N. Hart & Company, to Ketchum & Hartridge, on the lands in controversy (and on some personal property), given to secure their two promissory notes for two thousand dollars, due October 1st and November 1st, 1870, payable to the order of Isaac Hart and indorsed by him. A mortgage *fi. fa.*, based on this mortgage, from Sumter superior court, issued December 1st, 1875, for \$1,737.75, in favor of Robert M. Jourdan and Lewis G. Young, assignees in bankruptcy of Ketchum & Hartridge, against the lands as the property of I. N. Hart & Company. The names of the members of the firm are not stated in this *fi. fa.* It was assigned by the plaintiffs' attorney, on the 2^d of December, 1875, to

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the complainants, and levied on the lands on the following day, and the lands sold to the complainants. A deed from A. W. Wheeler, sheriff, dated February 1st, 1876, made in pursuance of said sale, in consideration of \$1,800.00 to the complainants.

The firm names set forth in this deed are Thomas Harrold, Henry R. Johnson and Uriah B. Harrold.

A bond for titles from complainants to Hansel Beckwith, dated March 10th, 1876, binding them to make a quit-claim title to Beckwith on the payment of his notes for \$2,600.00 given for the land. This bond and sale was cancelled on the 5th of March, 1882, no part of the notes having been paid, the papers returned to the respective parties, and an entry on the bond recites that possession of the land was surrendered to complainants.

A deed from Eldora V. Cottle to Henry Johnson, who, we are informed, is Henry R. Johnson, of complainants' firm, dated June 10th, 1875, conveying the land in controversy to him. The complainants claim title under these papers and exclusive possession from the 10th of February, 1876, up to the 8th day of December, 1883, when the defendants took possession of the out-house, and say they are still in possession by Albertus L. Beckwith, their tenant.

One of the leading features of the controversy is the possession of Hansel Beckwith. Both parties claim him as their tenant. The complainants show that Eldora V. Cottle brought her action of complaint for the land, in May, 1883, against them and both the Beckwiths, and to recover mesne profits from the first day of January, 1877. Hansel Beckwith swears that he was present at the sale of the land under the Ketchum & Hartridge mortgage *fi. fa.*, made on the first Tuesday in February, 1876; that the complainants bought it, and that the sheriff then put them in possession; that Eldora V. Cottle knew it, made no objection to it, and that Aaron T. Hart, one of the defendants in the *fi. fa.*, and who was understood to be the

real owner, consented thereto ; that on the 10th of March, 1876, he bought the land from the complainants with the knowledge of Eldora V. Cottle and the consent of Aaron T. Hart, and went into immediate possession thereof; and he and Albertus Beckwith both swear that he held possession until the 5th day of March, 1882, when, being unable to make payment, his contract was rescinded and he surrendered his bond for titles with possession of the land to complainants ; that John H. Walker, as agent of complainants, then took charge of it, and put Albertus Beckwith in possession as their tenant.

On the other hand, defendants say by their answers, their affidavits and those of Aaron T. and I. N. Hart, that the land was conveyed to Aaron and Isaac Hart by Harvey, executor of Brown ; that they went into possession and conveyed it to Eldora V. Cottle on the 8th of October, 1871 ; that she then took possession of it and resided on it, and that in 1873 she sold it to Hansel Beckwith for 160 bales of cotton, to be delivered, and gave him her bond for titles to convey to him when he should pay the purchase money, and that he took possession under his purchase from her, and held under her until he let Albertus Beckwith into the possession of the dwelling house as complainants' tenant in 1882; that Hansel Beckwith swore in a bill filed by him in 1874 against Samuel H. Hawkins and I. N. Hart & Co., a copy of which is in the bill of exceptions; that he went into possession as her tenant; that he offered to surrender to Eldora V. Cottle a few days before the bill in this case was filed; that she entered on the land peaceably, and went into the house in the oat-field with his permission, and they deny that they knew Hansel Beckwith claimed to be complainants' tenant, that he was ever dispossessed by the sheriff, and that complainants are in possession of the land.

Complainants claim that Eldora V. Cottle is the sister-in-law of Aaron T. Hart ; that the deed to her is without consideration, made to shield him from his creditors, and

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is therefore void, and that her sale to Hansel Beckwith was a part of this scheme; that Aaron T. Hart is the real party at interest in this and two other equity cases, copies of which are embraced as evidence in the bill of exceptions; and in support of this claim they refer to the sworn copy bills and answers, wherein it is alleged that though the land was conveyed by Harvey, executor to Aaron and Isaac Hart, the firm of I. N. Hart & Co. paid for it, and that it belonged to the firm; and that, in December, 1870, when this firm was dissolved, on a settlement with Aaron Hart, he then agreed to take the land and personal property thereon at \$12,000 00, pay himself a note which he claimed the firm owed him of \$2,420.00 and two other debts of the firm,—this one to Ketchum & Hartridge of about \$4,000 00, and one to Wilson & Co. or Wilson & Wilkins of about \$4,000 00; that he has transferred the note of the firm, of \$2,420.00, payable to himself, to O. J. Cottle, without consideration, and that Cottle is seeking to enforce it against the firm; that he has only paid \$2,000.00 on the debt due Ketchum & Hartridge, and \$900.00 on that due Wilson & Co.; refused to pay the balance of these debts, and conveyed the land to Eldora V. Cottle, that she might claim it for him against these creditors. And complainants show by Hansel Beckwith that Aaron Hart delivered Eldora V. Cottle's bond for titles to him, and that she was not known in the transaction by Joseph McMath; that Aaron Hart told him he intended to convey the land to Eldora V. Cottle to avoid the payment of his debts; and by Wiggins, Wade, Jordan, Fletcher, Tiner, Allen, Joseph Hart, T. M. and William Pilcher, that the land was known as Aaron Hart's, and that he was in possession thereof, claiming and using it as his own until 1874, long after the sale to Eldora V. Cottle, and that she took no part in the control or management thereof.

On the contrary, Eldora V. Cottle says Hansel Beckwith, in the bill filed by him before referred to, made oath that the only debt assumed by Aaron, on the dissolution of the

firm, was that in favor of Ketchum & Hartridge. A copy paper, following the bill in the evidence, dated November 21st, 1872, having the names of I. N. and Isaac Hart signed thereto, purports to release Aaron Hart from all firm debts, except that above named, and to give to him their interest in the farm. The defendant, Eldora V. Cottle, also says that, to the best of her knowledge and belief, she did not make the deed to Henry Johnson; that she has no recollection of it, and therefore she believes it to be a forgery. The two subscribing witnesses to its execution, Thos. B. Lumpkin, clerk of the superior court, and Wm. B. Butt, both swear to their signatures, and Lumpkin says, to the best of his recollection, he saw her sign it, and Butt swears positively he did see her sign it.

The evidence shows that the defendants went into the house in the oat-field in the night; that they were disturbing the tenants, and interfering with the cultivation of the farm.

It being represented to Judge Roney that Judge Fort was disqualified, he granted, in December last, a temporary restraining order and rule to show cause before the judge presiding at the following term of Sumter superior court. Judge Clarke was there then, and heard the case, and enjoined the defendants from doing anything to interfere with the full and free occupation of the houses and lands in possession of complainants' tenants, with the cultivation of the land, and from destroying timber or wood thereon, leaving defendants in possession of the house occupied by them, and allowing them ingress and egress to and from the same.

1. Exception is taken here to the jurisdiction of Judge Clarke, of the Pataula circuit, because Judge Fort, of the Southwestern circuit, was in the county where the order *nisi* was granted by Judge Roney, and where the hearing took place, and because it did not affirmatively appear that Judge Fort was disqualified. But Judge Clarke certifies that, though his attention was called to this matter after the evidence was closed, and pending the opening

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argument, he did not understand that the question was submitted, but understood that the hearing of the case by him was acquiesced in by counsel. The question not having been decided by the court below is not the subject-matter of review here. This case differs from *Sharman vs. The Town Council of Thomaston*, 67 Ga., 246, in that the record and bill of exceptions together show that Judge Fort was disqualified.

2. The object of the bill was not to remove the defendants from the house, but to restrain threatened trespasses by insolvents, very damaging in their character, to the enjoyment and use of the property, the rental value of which is alleged to be \$1,000.00 per annum, and therefore neither a warrant for forcible entry and detainer, nor to eject an intruder, on account of the delay incident thereto, would have reached the case.

Equity will restrain a trespass when the threatened injury is irreparable in damages, or when the trespasser is insolvent, or when there exist other circumstances, which, in the discretion of the court, render the interposition of the writ necessary and proper, among which shall be the avoidance of circuitry and multiplicity of actions. Code, §3219; *Graham vs. Dahlonge's Gold Mining Co.*, 71 Ga., 296.

3, 4. It is also said that complainants had no possession of the land, and that the court erred in holding that the tenant of the defendant might, after a sheriff's sale, which took away his landlord's title, and under which he might be ejected, attorn to complainants, without first abdicating the premises, abandoning his prior possession and severing his relation with his prior landlord.

The defendant claims title under a deed made by Aaron T. and Isaac Hart on the 8th of October, 1871. The mortgage was made on the 9th of May, 1870. It was signed by I. N. Hart, Samuel G. Hart, Aaron T. Hart and Daniel F. Hart, styling themselves partners, composing the firm of I. N. Hart & Co. Isaac Hart, then a resident of Schley

county, now deceased, indorsed the notes secured by the mortgage, but did not sign the mortgage. He was a member of the firm at its beginning in 1867, and seems to have remained a member thereof until it was dissolved on 15th of December, 1870.

There is evidence that the land was bought for the firm, paid for with the money of the firm, and the title conveyed to Aaron and Isaac for the firm. If this is true, then the law implies a trust in favor of the firm, for "whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another," a trust is implied. Code, §2316; 54 *Ga.*, 690.

If this state of facts existed, then the members of the firm were the equitable owners and tenants in common, and could mortgage the land. *Pitts vs. Bullard*, 3 *Ga.*, 5, 16; *Field vs. Jones*, 10 *Ga.*, 229; *Neligh vs. Michenon*, 11 N. J. Eq., 539; *Sinclair vs. Armitage*, 12 N. J. Eq., 174.

Four of the five partners did mortgage it. The mortgage was foreclosed, the land sold, and bought by the complainants, and if the proceedings were all regular, the sale operated to convey the interest of all the partners therein who joined in the mortgage. *Printup Bros. vs. Turner*, 65 *Ga.*, 71.

The lien of the mortgage antedated the deed to Eldora V. Cottle. The mortgage *fi. fa.* issued against the firm of I. N. Hart & Co. It does not set forth any of the firm names, except that of I. N. Hart, who was the successor of the firm when it was dissolved. This sale did not pass the title to the interest of Isaac Hart in the land, because he did not join in the mortgage. Whether it passed the title of all the other members of the firm as against a subsequent *bona fide* purchaser, it is not now necessary to decide. The sheriff's deed, made in pursuance of the sale, was at least good as color of title.

Hansel Beckwith says the sheriff put the complainants in possession of the land in February, 1876, with the

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knowledge of Eldora, who made no objection thereto, and with the consent of Aaron T. Hart, who was understood to be the owner of the land. If, after the land was sold and purchased by the complainants under the *fi. fa.* against I. N. Hart & Co., the sheriff came to put the purchasers in possession of the entire and undivided interest therein, and Hansel Beckwith agreed to surrender to him, and to hold possession for the complainants, we can see no legal objection thereto, especially if there was no objection on the part of adverse claimants to the land, or if the change of possession was made with notice to them. See *Beall vs. Davenport*, 48 Ga., 165.

5. There was a common law *fi. fa.* introduced in evidence in favor of Ketchum & Hartridge against I. N. Hart & Co, Isaac Hart appearing as one of the defendants therein, issued in 1875, on the same debt, and levied on the land in November of that year, but as no sale was made under it, we do not see how it affects the title to the land.

6. If Aaron T. Hart took the land from the firm when it was dissolved, and agreed to pay the Ketchum & Hartridge debt, and failed and refused to do so, and conveyed the land to Eldora without consideration, to shield himself from the payment of this and other debts assumed by him, and she gave her bond to Hansel Beckwith for this purpose, and it was so received by him, these conveyances would be void.

7. Though Isaac Hart did not join in the mortgage, yet the mortgage purports to be that of I. N. Hart & Co. The *fi. fa.* issued against the firm, and the land was sold and conveyed as the property of the firm. The complainants claim a prescriptive title to the land.

Eldora claims to be a *bona fide* purchaser for value, and denies the possession of complainants.

It was right for the chancellor to quiet the possession of the land by injunction, until all these questions could be

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determined by the jury. *Daniels vs. Edwards et al.*, 72 Ga., 196.

8. The sale of the land under the Armstrong *fi. fa.*, which issued from a judgment obtained on the Wilson & Co. debt, and which debt had been assigned to him, did not convey more than the equity of redemption therein. The mortgage was a prior lien thereon, and we are not advised of any irregularity in relation to it.

9. We do not see how the deed of Eldora V. Cottle to Henry Johnson, one of the complainants, could be in the way of an injunction in this case. The complainants were all suing for the use of the firm, and title might be shown in them or either of them.

If the deed is her deed, it concludes her. If it is not her deed, of course it cannot affect her rights.

10. On the hearing of this case, a motion was made to dismiss the bill of exceptions, on account of interlineations and erasures therein. In addition to what has been heretofore said on this subject, in *Masland, Jr., vs. Kemp et al.*, 72 Ga., 182, we will add that frequently bills of exceptions, which need correction by the judge, are sent to him in a distant part of the circuit. too late, after correction, to be returned and copied in time. The judge may always correct the bill of exceptions in the body thereof, so as to make it conform to the truth, if he chooses to do so. It would be better for the judge, whenever he corrects the bill of exceptions, not to interline it, but to make his corrections on the margin, or on a separate piece of paper, and attach it before certifying. No alteration by the judge, certified to have been made by him, will cause a dismissal of the case. Nor will an immaterial erasure or interlineation made by counsel. Material interlineations, additions or erasures, not made by the judge, or certified to have been made before the bill of exceptions was certified, will authorize this court to dismiss the case. It is the duty of counsel to present a clear, well written and orderly bill of exceptions to the judge, whenever he desires

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to bring a case here ; and it is the duty of the circuit judges to see that this is done. This court would not grant a *mandamus* absolute against a judge who refuses to certify an illegible, disorderly, erased or interlined bill of exceptions. See *McCall vs. Walter*, 71 Ga., 287, and authorities there cited, and *Anderson vs. Walker & English*, this term.

In this case, we have had great trouble to collect the facts on account of the want of system in attaching the papers together, duplicate copy papers in the bill and record also, illegible writing, omitted words and sentences in the record, which we presume the clerk could not read, and therefore could not copy, and the injection of a number of papers into the record, on a motion to attach the defendants for a violation of the injunction, and which do not appertain to this case. But for the suggestion of this court on the hearing, that the rule would be more clearly defined in this case, this bill of exceptions would have been dismissed.

The abstracts furnished in this case were very meagre and unsatisfactory. It would be a great relief to the court, if counsel for both parties would conform fully to the rule on this subject.

Let the judgment of the court below be affirmed.

DUKE vs. CULPEPPER.

1. A substantial compliance with the method pointed out for foreclosing a chattel mortgage, is essential to a judgment of foreclosure.
 - (a.) Where a chattel mortgage was given by C., trustee for E. C., and the affidavit to foreclose it alleged that E. C. was indebted, etc., C. being her agent, and credit having been given to the principal, such foreclosure was insufficient, and was properly dismissed.
 - (b.) Nor could this foreclosure be amended by alleging that the note was for the purchase money of the mortgaged property due by E. C.; that she promised to give her note and execute a mortgage to secure the same, having C. sign for her; but instead C. signed his own name, as trustee for her; that C. never was her trustee, and that the intention of all parties was to bind E. C. and the property.
 - (c.) Whether there is not a remedy in equity. *Quære?*

March 4, 1884.

Duke vs. Culpepper.

Mortgage. Pleadings. Amendment. Before Judge
FORT. Macon Superior Court. November Term, 1883.

Reported in the decision.

W. H. FISH, by brief, for plaintiff in error.

J. W. HAYGOOD; W. A. HAWKINS, for defendant.

HALL, Justice.

J. W. Culpepper signed a note payable to the plaintiff, and added to his signature the words, "trustee for Elizabeth Culpepper." At the same time he executed a mortgage for the security of this said note upon certain personal property, which it is admitted belonged to her, describing himself therein as J. W. Culpepper, "trustee for Elizabeth Culpepper," and adding to his signature of the same, "trustee," etc. An attempt was made to foreclose this mortgage against Elizabeth, and the affidavit of foreclosure set forth that she was indebted on said mortgage a given amount, then due, and further, that J. W. Culpepper, who signed the note which the mortgage was given to secure, was acting in the execution of the note and mortgage as her agent, and that the plaintiff, in taking the same, gave credit to her as principal of said agent, and looked to her for the payment of the indebtedness. Execution was issued upon this alleged foreclosure, and levied upon the property described in the mortgage. The defendant arrested this levy by a counter-affidavit, in which she denied that she ever signed the note and mortgage, or that the same were ever signed by any one authorized by her to execute them, or that the property which purported to be thereby conveyed was subject to the execution issuing upon the foreclosure, or that the same was even incumbered by the mortgage.

The issue thus made coming on for a hearing, a motion was made by defendant to dismiss the proceeding, when

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plaintiff's counsel proposed to amend the affidavit of foreclosure by adding thereto, that plaintiff sold the mortgaged property to defendant for the sum mentioned in the note; that he delivered the same to her, and that she promised to give her note for the purchase money, and to execute a mortgage on the property so purchased to secure the payment of the note,—that she would have J. W. Culpepper, her husband, to sign them for her; but he, instead of signing her name thereto, signed his own as trustee for her; that he was never her trustee; that all parties, including J. W. Culpepper, intended to bind her and the property by this arrangement; and that it was especially her intention to be bound thereby, as if her name had been signed by her husband to said paper as her trustee.

This amendment when offered was rejected, and the defendant's motion to dismiss the proceeding was granted, and these are the errors assigned to the ruling and judgment of the court.

1. It is contended by the counsel for the plaintiff in error that this mode of foreclosing a mortgage is a substitute for a bill in equity for that purpose, and that therefore as great a latitude, both of averment and amendment, should be allowed in the one proceeding as in the other.

Rawlings vs. Robson, 70 Ga., 595, is cited to show that where a husband signed a note with his own name, and added thereto, "agent for wife," this addition indicated that the debt was hers, and that he was her agent; that a failure upon her part to plead *non est factum* might be construed into an implied admission of his authority to act for her. Parol testimony was admissible in that case to show who she was, and in a suit at common law, containing proper averments, her liability for the debt might be shown, and judgment might be rendered against her, if he had authority to bind her. It is also true that the form in which the agent acts is immaterial; if he discloses his principal, and he professes to act for him, if within his authority, the act will be that of the principal. *Ib.*; Code, §2195.

But this is widely different from the case at bar. Here the proceeding is not at common law. It is under the statute regulating the foreclosure of mortgages of personalty (Code, §3971), and a substantial compliance with its requirements is essential to the judgment. It evidently applies only to the parties making the mortgage, or between the mortgagor and the mortgagee, or his assignee, in writing. Code, §§1972, 1996. This mortgage had necessarily to be in writing, and to be duly executed by the party to be bound thereby, or some one lawfully authorized. Code, §1955. A verbal mortgage would not be valid. The act creating the agency must be executed with the same formality as the law prescribes for the execution of the act for which the agency is created. Code, §2182. If a party is to execute a mortgage by an agent, it follows from this that the agent's authority must be in writing. But the party, in this instance, did not claim to act as agent but as trustee, and a trustee cannot create a lien upon the property of his *cestui que trust*. Code, §2335. It is true that the proceeding resorted to in this case is, in some measure, a substitute for a bill in equity, and that a defendant may rely upon any fact or principle of law which would entitle him to relief in a court of equity. 30 *Ga.*, 413; Code, §3975.

2. While holding that there was no error in quashing this foreclosure and rejecting this amendment, we do not intend to intimate that the plaintiff is without remedy. Perhaps he may go into equity, and there insist upon a specific execution of his contract, including the lien for which he asserts he stipulated; and if he succeeds in getting a decree for this, he may go further and foreclose it, especially since the act of 1880, Code, §3979 (a); and if there is danger of removing or abusing the property agreed to be mortgaged, the same tribunal may furnish a remedy for its protection and preservation. This much is said by way of suggestion.. Nothing is decided upon the questions that may arise.

Judgment affirmed.

Adams vs. Dickson.

ADAMS vs. DICKSON.

Where, pending a suit, defendant was adjudged a bankrupt, and thereafter, but before final discharge, a judgment was rendered in the suit, there having been no plea or suggestion of bankruptcy, such judgment could subject the exemption which was set apart to the bankrupt but was not exempted under the state laws.

(a.) This case distinguished from 65 Ga., 624; 71 Id., 71.

(b.) If a judgment be rendered by inadvertence in the state court, pending bankruptcy, whether it can be set aside on a direct proceeding for that purpose. *Quære?*

March 4, 1884.

Bankruptcy. Exemptions. Debtor and Creditor. Before Judge HUTCHINS. Franklin Superior Court. September Term, 1883.

Reported in the decision.

ALEX. S. ERWIN; W. R. LITTLE; E. N. BROYLES; MALCOLM JOHNSTON, for plaintiff in error.

W. I. PIKE; A. L. MITCHELL, for defendant.

HALL, Justice.

Pending a suit in the superior court of Franklin county, the defendant filed his petition in the district court of the United States for the northern district of Georgia, praying that he might be declared a bankrupt, and on the petition he was duly adjudged a bankrupt, and thereafter had set apart to him by that court certain property as an exemption in bankruptcy. No suggestion of the bankruptcy was made to the court in which this common law suit was pending, and a judgment was rendered therein, after the adjudication in bankruptcy, and before his final discharge. On this judgment an execution was issued, which was levied on the exempted property. No application was made to have the property thus exempted set apart under the state laws as a homestead and exemption for the ben-

efit of the defendant's family. This execution having been levied on the property exempted by the bankrupt court, an affidavit of illegality was filed to this levy, denying that the property was subject to seizure and sale under the *f. fa.*, because it had been exempted in bankruptcy, and because he was finally discharged after the judgment in the common law suit had been rendered.

The above recited facts as to the time of the adjudication, the rendering of the judgment thereafter by the superior court, and the failure of the defendant to suggest his bankruptcy and arrest the proceedings, appearing from the affidavit of illegality, the court, upon demurrer, dismissed the same, and this judgment was assigned as error here.

In our opinion, under the repeated rulings of this court, no other result could have been reached by the court below.

After the defendant had been adjudged a bankrupt and the property was exempted, he was as perfectly at liberty to sell and dispose of it as he would have been at any time prior thereto. The only effect of his final discharge was to extinguish debts and liens existing previous to his adjudication. These could not incumber either the property exempted, or that subsequently acquired, but from this it does not follow that no charges or liens could be created upon the property, either by his contracts, or by operation of law, in consequence of debts subsequently contracted, or by the renewal of those which would, but for a promise to pay them, have been suspended by the adjudication and extinguished by the final discharge. The judgment rendered pending the proceedings in bankruptcy will not be presumed, from that fact, to be void; on the contrary, the presumption is, that the debt on which it is founded is either one from which the final discharge would not relieve the bankrupt, or that it was such as he in conscience felt bound to pay, and therefore consented to let the judgment go against him. If it was the result of inadvertence or

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mistake, he might, perhaps, by a proper case made, get relief from it, by a direct proceeding in the court rendering it, to set it aside, but there was nothing before the superior court to authorize or require it to give that direction to the case, and we express no opinion upon the subject. 61 *Ga.*, 58; 64 *Id.*, 341; 65 *Id.*, 466; 61 *Id.*, 500; 60 *Id.*, 533; 56 *Id.*, 559; 59 *Id.*, 763; 62 *Id.*, 298; *Anderson vs. Clark, administrator*, 70 *Ga.*, 362.

There is nothing in *Ross vs. Worsham*, 65 *Ga.*, 624, or in *Brady vs. Brady*, 71 *Ga.*, 71, in conflict with this view; in both those cases, there was an attempt to enforce a lien existing at the adjudication in bankruptcy against the exemption. There was nothing in either of them from which a waiver from the effects of the adjudication and discharge in bankruptcy could be implied.

Every question in this case is determined by *Felker vs. Crane, Boylston & Company*, 70 *Ga.*, 484. We there distinctly held that the title to property exempted to the bankrupt did not vest for the use of his family, unless set apart by the state law as a homestead, etc., for them, and that without this it was subject to any debt contracted after the adjudication and discharge of the bankrupt, and we carefully distinguished that case from *Ross vs. Worsham*. That property acquired by the bankrupt, subsequent to his discharge, is not subject to one of those existing previous thereto, see 9 *Ga.*, 9; 65 *Id.*, 577.

Judgment affirmed.

WILSON vs. WRIGHT, survivor.

1. Attorneys have a lien for fees, both at common law and by statute, upon land recovered by them for their client.
2. After the attorneys had filed a bill to enforce their lien for fees, one who purchased the land did so with notice, and did not acquire a title freed from the attorneys' lien.

March 4, 1884.

Attorney and Client. Liens. *Lis pendens*. Notice.

Wilson vs. Wright, survivor.

Before Judge BOWER. Dougherty Superior Court. October Term, 1883.

Reported in the decision.

D. H. POPE, for plaintiff in error.

G. J. WRIGHT, in *propria persona*, for defendant.

BLANDFORD, Justice.

Wright & Warren, as attorneys at law, prosecuted a certain action in favor of one Reid, whereby Reid recovered a large tract of land by their services, not having received anything for their services, they filed this bill for the purpose of securing their fees, and they sought to reach a certain fund in the hands of the administrator of one Brinson, which they claimed arose from the rents of the Reid place, which had been recovered by their services as attorneys; also to subject a sufficient portion of the land to be sold to satisfy their claim for fees. Pending this bill, Wilson, the plaintiff in error, purchased this land. The complainant amended his bill, and asked to make Wilson a party defendant. The court allowed this to be done. Wilson excepted, and this is the error complained of.

1. The attorneys had a lien upon the land recovered by their services at common law and by our statute. 14 *Ga.*, 89; 29 *Id.*, 185; 31 *Id.*, 195; 56 *Id.*, 281; Code of 1863, §1989.

2. But plaintiff in error insists that, although the attorneys had a lien on this land, yet he was a *bona fide* purchaser without notice, and his title is unaffected by any lien of defendant in error.

It is admitted that he purchased this land since the filing of defendant's bill and during its pendency. In such cases, the doctrine of *lis pendens* applies to plaintiff in error. This pendency of the action is notice to all persons. 35

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Ga., 213; 44 *Id.*, 466; 48 *Id.*, 443; 54 *Id.*, 209; 55 *Id.*, 401; 1 Story's Equity Jur., §§405 to 407. So the plaintiff is not a *bona fide* purchaser without notice; under the circumstances, the law charges him with notice.

We see no error in the several rulings of the court below in this case, and the judgment is affirmed.

Judgment affirmed.

OLMSTEAD, by next friend, *vs.* DUNN *et al.*; DUNN *et al.*, by next friend, *vs.* ROGERS, trustee; DUNN *vs.* ROGERS, trustee, *et al.*

[These cases were argued at the last term, and the decision reserved.]

1. Certain forms are necessary in order for a testator to put down his intention on paper, so that the courts may reasonably be assured that he made and published the paper as his will, such as a certain attestation, signature, etc. But when that assurance is had, and the probate court has pronounced the paper to be the will of the testator, then it is the law of his property (with certain fundamental restrictions), and the question becomes, what did the testator say, and what did he intend by that paper? What he said in it, read in the light of the circumstances surrounding him when he made it, is what he intended to be done with his estate, and therefore what will be done with it.
 - (a.) Each will must be construed for itself, and, in large part, depends upon its own terms and the peculiar circumstances surrounding the testator.
 - (b.) Among the most important surrounding circumstances are the recipients of testator's bounty, their relations to him and associations with him, his uniform affection for them, or any interruption thereof.
2. A vested remainder is one limited to a certain person at a certain time, or upon the happening of a certain event. The law favors the vesting of remainders in all cases of doubt, and in construing wills, words of survivorship will refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears.
3. The fourth item of a testator's will contained the following provision: "It is my will that my executors hold and have my two lots, numbers five and six, Eyles Tything, Heathcote Ward, and also my lot number ten, First Tything, Reynolds Ward, and all improvements thereon, in trust to and for the use of my daughter."

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Eliza Waters, for and during the term of her natural life, and after her death to and for the use of her children, if any she shall have, share and share alike; and if she shall have no children living at her death, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for their natural lives, and after their death, then in trust to and for the use of the children of my said daughters, Jane A. Bruen and Harriet Bryan, share and share alike forever."

The fifth item contained the following provision: "It is my will that my executors have and hold my lot number ten, Eyles Tything, Heathcote Ward, forever in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and during their lives, and after their respective deaths, then in trust to and for the use of the child or children of my said daughters, Jane A. Bruen and Harriet Bryan, their heirs and assigns forever, share and share alike."

The tenth item contained the following provision: "It is my will that my executors hold and have my railroad stock, in trust to and for the use of my daughter, Eliza Waters, for and during her life, and after her death, then in trust to and for the use of her children, if any she have, and if none, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and during their lives, and after their deaths, then in trust to and for the use of their issue, share and share alike."

Testator's daughter, Eliza, died childless. Testator had grandchildren living when the will was executed:

Held, that the fifth item of the will gave a life estate in common to the two sisters, Jane A. Bruen and Harriet Bryan, with remainder to their child or children; and there being such children *in esse* when the testator died, the remainder then vested, to be enjoyed at the death of the surviving sister, and opened to take in such other children as were not *in esse*, but who came into being up to the time when the enjoyment of the estate was to commence, and all took share and share alike *per capita*.

(a.) The fourth and tenth items differed from the fifth only in the fact that the life estate of the two sisters, as well as the fee of their children, was contingent upon the death of Eliza Waters without issue, and the life estate in Jane A. Bruen and Harriet Bryan and the ultimate remainder to the children did not vest until the death of Eliza Waters childless.

(b.) This does not conflict with the judgment in 38 Ga., 154, though it may conflict with some of the reasons there stated; and when that case was reversed, it went back for a decree *de novo*.

June 10, 1884.

Olmstead, by next friend, vs. Dunn *et al.*; Dunn *et al.*, by next friend, etc.

Wills. Estates. Legacies. Title. Before Judge HARDEN. Chatham Superier Court. March Term, 1883.

Reported in the decision.

DENMARK & ADAMS, for plaintiff in error in first case.

J. R. SAUSSY; CHISHOLM & ERWIN; GARRARD & MELDRIM, for defendants.

CHISHOLM & ERWIN, for plaintiffs in error in second case.

J. R. SAUSSY; DENMARK & ADAMS; GARRARD & MELDRIM, for defendant.

CHISHOLM & ERWIN, for plaintiff in error in third case.

DENMARK & ADAMS; GARRARD & MELDRIM; J. R. SAUSSY, for defendants.

JACKSON, Chief Justice.

John Waters, on the 14th day of December, 1835, executed the following will and codicil:

“In the name of God, Amen:

“I, John Waters, of the city of Savannah, being of sound and disposing mind and memory, but weak in bo’y, do make this my last will and testament:

“First. I will that all my just debts and funeral expenses be paid.

“Second. I give and bequeath my negroes, Maria, Sandy, William, Adam and Nelly, to the female asylum of the city of Savannah, on condition that said corporation exact no service from them, and only the sum of five dollars from each per annum.

“Third. All the rest and residue of my property, real and personal, in possession or in action, and all moneys, stocks and debts, I give, devise and bequeath to my executors, hereinafter named, forever, in trust to and for the uses hereinafter appointed.

“Fourth. It is my will that my executors hold and have my two lots numbers five and six (Nos. 5 and 6), Eyles Tything, Heathcote Ward, and also my lot number ten (No. 10), first Tything, Reynolds Ward, and all improvements thereon, in trust to and for the use of my daughter, Eliza Waters, for and during the term of her natural life, and after her death to and for the use of her children, if any she shall

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have, share and share alike, and if she have no children living at her death, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for their respective lives, and after their deaths, then in trust to and for the use of the children of my said daughters, Jane A. Bruen and Harriet Bryan, share and share alike forever. It is my will that my executors, from the residue of my estate, cause to be built a good brick house and out-buildings on the said lot number six, Eyles Tything, Heathcote Ward, as early after my death as may be.

"Fifth. It is my will that my executors have and hold my lot, number ten (No. 10), Eyles Tything, Heathcote Ward, forever in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and during their lives, and after their respective deaths, then in trust to and for the use of the child or children of my said daughters, Jane A. Bruen and Harriet Bryan, their heirs and assigns forever, share and share alike. It is my will that my executors, as early after my death as may be, cause to be erected on the said lot number ten a good brick house and out-houses, and that the cost thereof be taken from the residue of my estate.

"Sixth. It is my will that my executors have and hold my lot on Broughton street, number four (No. 4), Liberty Ward, and the improvements thereon, in trust to and for the use of my daughter, Harriet Bryan, for and during her life, and after her death, then in trust for her children, their heirs and assigns, share and share alike.

"Seventh. It is my will that my executors have and hold my lot, number nine (No. 9), Second Tything, Anson Ward, adjoining Doctor Reid's, in trust to and for the use of my daughter, Jane A. Bruen, for and during her life, and after her death, then in trust for her issue, if any she have at her death, and if none, then after her death in trust to and for the use of the children of my other two daughters, their heirs and assigns forever, share and share alike.

"Eighth. I give and bequeath to each of my said daughters two negroes, to be selected by them from my gang, to be held by my executors in trust for them respectively, during their lives, and after their respective deaths to their respective children, if any they have, and if none, then to my grandchildren, share and share alike.

"Ninth. It is my will that my executors sell and dispose of, at public or private sale, my lot, number nineteen (No. 19), Columbia Ward; also my plantations and all other real estate not before disposed of by this will, and all the remainder of my slaves, and that in the case the negroes be sold with the plantation, that they be sold in families. All this I leave to the discretion of my executors.

"Tenth. It is my will that my executors hold and have my railroad stock in trust to and for the use of my daughter, Eliza Waters, for and during her life, and after her death then in trust to and for the use of her children, if any she have, and if none, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and

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during their lives, and after their deaths, then in trust to and for the use of their issue, share and share alike.

“Eleventh. It is my will that my executors invest all the rest and residue of the proceeds of my estate, and all moneys of my estate which shall remain after the payment of my debts and the costs and charges of the improvement before directed to be made on my lots, numbers six and ten (Nos. 6 and 10), Eyles Tything, Heathcote Ward, in bank stock, and that they have and hold the said stock in trust for the equal use and benefit of my daughters aforesaid, during their respective lives, and after their deaths, then in trust for the use of the children of my said daughters, and if either of my daughters die without issue, her share to go to her sisters, and if either die leaving issue, her share to go to her issue.

“Twelfth. I nominate, constitute and appoint my friends, William H. Cuyler, George W. Anderson and William W. Gordon, or such of them as shall qualify on this my will, the executors of this my last will and testament.

“Thirteenth. It is my will that the installments on my railroad stock, which shall hereinafter be called in, be paid by my executors out of the residuum of my estate.

“Fourteenth. It is my will that my lots in town given above to my daughters be never sold by any order of court, consent of parties or in any other manner, but always be held for the trust before named, and in the event of the death or disability of all my executors without representation, the superior court of Chatham county appoint a trustee to carry into effect this will.”

A bill was brought against parties defendant claiming an interest in the property bequeathed in the 4th, 5th and 10th items of this will. The facts are undisputed, and the whole case was submitted to the decision of Judge Harden, of the city court of Savannah, the judge of the superior courts of the Eastern circuit being disqualified.

Outside of the will itself, the facts are, that the testator died in 1836, leaving three daughters, Eliza Waters, Jane A. Bruen and Harriet Bryan. Eliza Waters died without issue, having never married, in 1865; Jane A. Bruen died in 1867, having married, and leaving one child; and Harriet Bryan died in 1882, leaving three children, who survived her, to-wit: Florence A. Bryan, Amanda C. Harris and Jane E. Cloud. She gave birth also to a son, John Waters Bryan, who died before his mother, leaving children, however, who survived their grandmother, Harriet Bryan. The child

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of Jane A. Bruen, named Margareta, married Alexander Dunn prior to 1866, who is still living, with two of the children of Margareta, who survived their mother. John Waters Bryan was living when his grandfather, whose name he bore, died. Thus questions are made on these items of this will—4, 5 and 10—whether the children of the two sisters, Mrs. Bruen and Mrs. Bryan, the grandchildren of the testator, at the termination of the life estate in those sisters, took *per capita* or *per stirpes*; and whether all of them took, or only those who survived the last tenant in common of the life estate; that is to say, who were alive when Mrs. Bryan died.

Mr. Dunn says that his wife took a vested remainder at her grandfather's death, and as she was the only child of Mrs. Bruen, she took one-half of the estate in remainder, the will intending a division *per stirpes* and not *per capita*, and by his marital rights attaching when he married her, he is entitled to one-half. His children by Mrs. Dunn do not contest his title, except to say that, if the court thinks the property theirs, though counsel advise them that it is not, they are willing to take it.

The children of John Waters Bryan agree with Dunn that the remainder is a vested remainder, but claim that the division must be *per capita* and not *per stirpes*, and hence that Dunn can only take one-fifth of the property, instead of one-half, which he claims.

The three children of Mrs. Bryan, who survived her, insist that the remainder did not vest in the grandchildren of the testator at his death, or at any other time prior to the death of Mrs. Bryan, but was contingent upon their survivorship of her, and vested only in those who survived her, and as they alone survived her, they contend that the estate in remainder vested in them only then, and of course that each of them must have a third of it, to the entire exclusion of their cousin's husband and children and of their own brother's children.

Every will is a thing to itself. It is emphatically not only *sui juris* but *sui generis*. Its terms are its own law,

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and the application of that law by construction of itself—of the statute which the testator himself enacted, to the contestants for its bounty, is the plain duty of the court.

Like variety in the leaves of the forest and the faces of mankind, no two wills scarcely can be found precisely alike. So that every will not only must be construed by itself as containing its own law, but being the only one of its kind, having only its own features, countenance and expression of the mind—the intention that the mind of him who can no more be heard by word of mouth expressed in those features and that face which he put on the paper, it can receive but little help from the expression of other features and faces put on paper differently by other minds. Therefore, only general rules of construction can be laid down in the books to help in ascertaining the true will of any man, how he intended to have his property disposed of at his death. Certain forms are necessary in order that he may so put down his intention on paper that the courts may reasonably be assured that he made and published the paper as his will—such as the number of witnesses, the signature of testator, the attestation of witnesses to it, etc.; but when that assurance is had, and the probate court has pronounced the paper to be his will, then that will is the law of that dead man's property, and what is it, what did he say on that paper is the question; what did he intend by that paper is the problem for every court of construction; for what he said on that paper, read in the light of the circumstances surrounding him when he made it, is exactly what he intended to be done with his estate, and becomes the legislative will of him whom the supreme power in the state invested with law-making power, so far as his own accumulations during life are concerned, and is thus law as strong as any statute, as high as the constitution itself. We must look, therefore, at the words of the will and the circumstances surrounding this man the year before his death, to see what he wished should become of his property, when he could never more enjoy himself, but could say, within certain limits of duration

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of enjoyment and other fundamental restrictions, who should enjoy it then.

The court below held that he intended that his two daughters, Mrs. Bruen and Mrs. Bryan, should enjoy it during their lives, and at their death it should be divided between his grandchildren, share and share alike, and if an / grandchild should be dead when the last life-tenant expired, and should leave children of their own, then those children should take the share of the dead parent. Did he mean that? It would be quite wonderful if he did not so mean. John Waters Bryan was a living boy when the grandfather made this will. The testator had known and loved this little boy. He prattled often around his knees, and the heart of the man soon to die beat with something of the pleasure of his own boyhood as he watched the gambols of his descendant and his only name-sake. Can it be possible that he intended to disinherit this boy's children, if he lived to manhood and left them, because his mother lived to a great age, and the son died a week before her? If he said so, unquestionably, though unnatural and strange, it is the law; but in ascertaining whether he said so or not—what was his intention in using the words written, the law permits the court to look at that boy and the other little grandchildren alive when he made the will, and if there be any doubt about the expression on the face of the will, to touch the heart of the testator and survey the countenance of the will more closely, and study the expression again, which is always, in all wills, but the mirror of the heart—the reflection of its motive power, its volition, its intention.

I have often thought that the reason why the law required so little sense, mind, reasoning capacity, intellect, to make a will, is because the intention, the heart, the seat of the volition, had so much more to do with it than the cold, calculating intellect, which is brought into play when antagonized by another as cold and calculating in making contracts as itself. It is laid on a corner-stone almost as deep and strong as that on which Omniscience

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builds the mansions in the skies for heart-believers to occupy; erected for the occupancy not of those who lay the foundation of belief in the self-sufficiency of an intellect which would argue and contract with its creator and benefactor, but on the longings of a heart which beats for the immortality of goodness, and distrusting the grasp of feeble reasoning powers, "believeth unto righteousness" on the only perfectly good Being who ever inhabited human flesh, and gladly takes as beneficiaries under his will whatsoever his grace gives, asking no questions. Just as the will of Christ came fresh from a heart flowing with love and beneficence, so the will of every testator flows directly from the fountain of the affections; and in construing it, to ignore the heart is to remove the corner-stone and crush the design of the building the testator erected.

Therefore our Code declares that "in the construction of all legacies, the court will seek diligently for the intention of the testator." Code, §2456. And again it declares that "when called upon to construe a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of its execution." Code, §2457.

Among the most important of those surrounding circumstances are the recipients of his bounty, their relations to him and associations with him, his uniform affection for them, or any interruption of the current of that affection; all indicating the direction of the current of his love, his heart-flow towards them.

So in *McGinnis vs. Foster*, 4 Ga., 380, this court cites approvingly this paragraph of the opinion of the court in 9th Leigh, 79, in which Justice Parker said, "I cannot believe the testator meant . . . if all but one of the children died before the mother, for that one to take all, in exclusion of grandchildren and their descendants. This would, I believe, in ninety-nine cases out of a hundred, defeat the intention of the testator. The safest and soundest construction is to consider the estate as vesting at the death of the testator, and not to give the whole to such legatee

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as happens to survive the tenant for life, or, if none survive, to declare a total intestacy."

So Lord Mansfield, in the case of *Goodtitle vs. Whitby*, cited with approbation in the case in 6 Wallace, 478, said: "Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now suppose the object of the testator's bounty marries and dies before his age of twenty-one, leaving children, could the testator intend in such an event to disinherit them? Certainly he could not."

"Such a construction," says Judge Warner in the case of *Vickers vs. Stone*, 4 Ga., 464, "would be a harsh and unnatural one to give to the will of testators."

Therefore it is seen that as well our court as our statutes would bring us to the consideration of these clauses of this will, looking at the surroundings of the testator, with an eye favorable to such a construction of the terms employed in these items as to divide the property equally among the children, and in case of the death of any before Mrs. Bryan's decease, leaving issue, embracing that issue in the division, in lieu of deceased parents. Of course, if the words of the will make a different construction imperative, we have no option but to give them effect; but if the other construction can be put upon them in accordance with law, it will be a pleasant duty to give effect to that. And, in our judgment, there is no serious difficulty in giving them the latter construction under the rules of law applicable to the facts.

In *Fearne on Remainders*, the general rule is thus laid down: "Whenever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained that the preceding estate may by any means determine the expiration of the estate limited in remainder, such remainder is vested." 1 *Fearne*, 216. So our Code declares, "A vested remainder is one limited to a certain

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person at a certain time, or upon the happening of a necessary event." Code, §2265. It also declares in section 2269 that "the law favors the vesting of remainders in all cases of doubt. In construing wills, words of survivorship shall refer to the death of the testator, in order to vest remainders, unless a manifest intention to the contrary appears." See also 4 *Ga.*, 382; 7 *Id.*, 544; 4 Kent, 203; 5 Mass., 535; 4 *Ga.*, 463; 5 Wallace, 287; 6 *Id.*, 475-7, to the same point.

So in 5 Wallace, 288, the rule is thus laid down: "It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder, when an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after born children, and to be divested as to those who shall die without issue."

And so our Code declares that remainders "may be created for persons not in being, and if a vested remainder, it opens to take in all persons within the description coming into being up to the time of enjoyment commencing." See also 2 Jarman on Wills, 704, note 2.

Now, without going into particular cases analogous more or less to this, let us look at these items of this will and see what they mean, in the light of the general principles above set out.

The fifth item of the will is:

"It is my will that my executors have and hold my lot, number ten (No. 10), Eyles Tything, Heathcote Ward, forever in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and during their lives, and after their respective deaths, then in trust to and for the use of the child or children of my said daughters, Jane A. Bruen and Harriet Bryan, their heirs and assigns forever, share and share alike."

It seems to us clear that this item gave a life estate in common to the sisters, remainder over to their child or children, and there being such children *in esse* when the

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testator died, the remainder then vested, to be enjoyed at the death of Mrs. Bryan, the surviving sister, and opened to take in such other children as were not *in esse*, and all took share and share alike, *per capita*.

The fourth item is:

“It is my will that my executors hold and have my two lots numbers five and six (Nos. 5 & 6), Eyles Tything, Heathcote Ward, and also my lot number ten (No. 10), First Tything, Reynolds Ward, and all improvements thereon, in trust to and for the use of my daughter, Eliza Waters, for and during the term of her natural life, and after her death, to and for the use of her children, if any she shall have, share and share alike, and if she have no children living at her death, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for their respective lives, and after their death, then in trust to and for the use of the children of my said daughters, Jane A. Bruen and Harriet Bryan, share and share alike forever.”

It is equally clear to us that, with the exception of the bequest to Eliza Waters for life and to her children, should she have any, in remainder, this devise is a counterpart of the fifth item in effect, and must be construed substantially like it.

She, Eliza Waters, had no children; the remaining words then are, “then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for their respective lives, and after their deaths, then in trust to and for the use of the children of my said daughters, Jane A. Bruen and Harriet Bryan, share and share alike forever.”

The only difference is that, as well the life estate of the two sisters as the fee of their children, was contingent upon the death of Eliza Waters without issue. So that their life estate and the remainder which it supported vested not at the death of the testator, but at the death of Eliza Waters without issue. The practical effect, however, is the same, inasmuch as Eliza Waters died before the act of 1866, and Dunn's marital rights attached as well on the vesting at her death as they would have attached at testator's death; and as respects the other contestants, it can make no difference either.

Olmstead, by next friend, vs. Dunn et al.; Dunn et al., by next friend, etc.

The tenth item is like the 4th. It is as follows :

“It is my will that my executors hold and have my railroad stock in trust to and for the use of my daughter, Eliza Waters, for and during her life, and after her death, then in trust to and for the use of her children, if any she have, and if none, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and during their lives, and after their deaths, then in trust to and for the use of their issue, share and share alike.”

So that, in our opinion, the estate for life and remainder vested here too on the death of Eliza Waters.

The conclusion is that the decree dividing the estate, share and share alike, between Dunn, in right of his wife, and the surviving children of Mrs. Bryan and the heirs of her son, who died before her, each to take one-fifth of the property bequeathed in the 4th, 5th and 10th items of this will, is right, as well as the division of that in the 6th item, which stood by itself, between the children of John Waters Bryan and their three aunts, into four equal parts.

On a careful examination of the judgment in *Dunn vs. Bryan*, 38 Ga., 154, we do not see that it adjudicates any point here decided. The 11th item of this will is alone there construed, and the struggle was over the life estate, as survivor of Mrs. Bryan, and not the remainder of the children. She was held by this court not entitled to enjoy a life estate under item 11, and if the contest was abandoned as to the other items here involved 4, 5 and 6, and Judge Fleming's opinion thereon, or rather his judgment thereon stood affirmed, it only affirmed her life estate, and did not affect the remainders.

But when that case in the 38th, *Dunn vs. Bryan*, was reversed, it all went back for a decree *de novo*; no matter what was argued or abandoned here, and nothing was affirmed unless the remitter so directed.

Our conclusion, therefore, is to affirm the decree rendered by Judge Harden, and reference is hereby called to his very able and learned opinion before he decreed thereon.

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Of course, there are *dicta* by Judge Fleming which conflict with the views above expressed, but his judgment as to the life estate is the same as indicated in the views above presented. On all that he said about contingent remainders here, and that the fee would be only in the children surviving Mrs. Bryan, we differ from him; but in respect to her tenancy for life in the entire property we agree.

So there may be expressions in the opinion of this court, as delivered by Chief Justice Brown, not accordant with what is here decided, but there is no judgment with which we collide.

Judgment affirmed.

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1. A deed made to secure a debt, with a written obligation to re-convey on payment of the debt as stipulated, given by the grantee to the grantor, taken together, make an equitable mortgage; and one who took title from the grantee of the deed, with notice, could not recover, except upon the same terms as the original grantee, whenever the equities of the grantor are set up.
 - (a.) Peculiarities of this loan, being for an indefinite time, and leaving the question of time for payment of the principal for mutual agreement, discussed.
2. An absolute deed to secure a debt conveys titles, and in order to defeat a recovery thereon by reason of an agreement which, taken with the deed, would make it an equitable mortgage, it is incumbent on the defendant to set up such equities; and where he relies on the agreement to re-convey on certain terms, he must rely upon it as it stands, and cannot attack the deed as usurious, because the rate of interest specified in the contract was usurious unless it was signed by him, which was not done. If he sets up in his equitable plea and relies on the contract which specifies the payment of a certain rate of interest as a condition of re-conveyance, he thereby promises to pay it.
 - (a.) The act of 1875, under which this arrangement was made, does not require that the paper should be signed by the debtor, but only that the rate of interest should be specified in writing. *Semble*, that an agreement to re-convey, in the handwriting of the debtor and signed by the creditor, was a sufficient specification in writing.

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- 3 The law does not favor interest on interest, except in special cases of fiduciary trusts and the like. In cases where interest is contracted for at higher rates than seven per cent, the contract must plainly show the liability. In the present case, where the contract provided for the annual payment of ten per cent on the principal sum, amounting to an annual payment of \$500, it was error to charge that such installments, if not paid, bore interest at ten per cent until paid.
4. Where a loan of money was made with interest at ten per cent, to be paid annually, but no time was specified for the re-payment of the principal, that being left for the agreement of the parties, and to secure such a loan a deed was made to the creditor, who gave to the debtor an agreement to re-convey on payment, if the creditor conveyed the land to one who bought with notice, and who brought ejectment against the debtor, the right of fixing the time of payment by consent was abrogated, and it would be inequitable thereafter to allow a claim for interest on the annual interest unpaid, if it had previously been proper to so compound it.
5. Where an action of ejectment was based on a deed made to secure a debt, and the only equitable plea filed was stricken, a verdict and decree finding for the plaintiff the premises in dispute, fixing the amount of the debt, and allowing the debtor ninety days in which to redeem, in default of which the equity of redemption was to be barred, was illegal. Such finding went beyond the pleadings, and allowed plaintiff to recover the land, in default of payment, within the time prescribed, without either providing for the satisfaction of the debt, or any specified credit to be entered thereon.
 - (a.) The true equity (with proper pleadings), if the debtor is unable to pay the debt, is to have the land sold, the debt paid and the balance paid to him; or if the proceeds are not sufficient to pay the debt, to credit them thereon.
 - (b.) The old English mode of allowing a mortgagee to enter and work out a debt does not exist in Georgia, and a plea, praying that this be allowed, was properly stricken.
 - (c.) It is not decided that reasonable time to pay the debt might not be allowed before the compulsory sale, if reasonable delay has not already been had, where there are proper pleadings therefor.

May 13, 1884.

Deed. Mortgage. Notice. Vendor and Purchaser. Interest and Usury. Verdict. Pleadings. Before Judge FAIN. Bartow Superior Court. July Term, 1883.

To the report contained in the decision, it is only necessary to add that Wofford made to Mrs. Wyly a deed abso-

lute on its face, and on this the case of plaintiff in ejectment was based. Defendant in ejectment (Wofford) took from Mrs. Wyly the following instrument :

“ I have loaned to Wm. T. Wofford five thousand dollars for an indefinite time, but which may be hereafter determined by us, with interest at the rate of ten per cent per annum, payable annually ; and for the better securing of the same, the said Wm. T. Wofford has made and delivered to me his deed to the settlement of land on which he now lives, near Cass Station. Now, when the said William T. Wofford shall pay me the said sum of five thousand dollars, with interest at the rate of ten per cent per annum, then I am to re-convey said settlement of land to him.”

The jury found for the plaintiff the premises in dispute, settled the debt due by defendant at \$7,000.00, and allowed him ninety days in which to pay it and have the land back, and in default thereof, barring the equity of redemption forever. The court decreed accordingly. Defendant moved for a new trial, on the following grounds :

(1.) Because the verdict was contrary to law and evidence.

(2.) Because the court charged as follows : “ In calculating the interest on the annual installments of interest, you will calculate the interest at ten per cent per annum on the principal ; for instance, if it should be five hundred dollars for the first year, then you will calculate the interest on this five hundred dollars at ten per cent per annum from the time it was due until paid ; or, if not paid, up to the present time, as if it was a separate note for five hundred dollars ; and so on for each year and on each annual installment of interest on the original principal sum.”

(3.) Because the court refused to charge as follows : “ When the principal debt fell due, no annual installment of interest thereafter falling due would draw interest, but would retain the character of interest, and not draw interest. That after the principal debt became due, the interest would accrue and become due daily and not annually, and would not draw interest upon itself ;” but in lieu of this request, charged as follows : “ The interest fell due annu-

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ally, after as well as before the principal debt fell due, and the installments of interest falling due after maturity of the principal would bear interest just the same as the installments of interest which fell due before the principal debt became due." [The court notes that he charged also, that the interest on annual interest would not draw interest at all, and that there could be no compounding of interest.]

(4.) Because the court charged as follows: "You may find the premises in favor of M. L. Johnson, and you may give the defendant a reasonable time to redeem by paying the money you find due to M. L. Johnson, within a certain number of days or months, or such reasonable time as you think proper, in which to redeem. The law contemplates a reasonable time, but it is with you whether you give any time to redeem."

(5.) Because the court erred in striking defendant's amended plea, which was as follows:

"Defendant further amends his plea, and says that the deed upon which plaintiff is seeking to eject defendant from the premises, described in plaintiff's declaration in above stated case, is tainted with usury for the following reasons, to-wit.: At the time said deed was made, it was stipulated by, and agreed by and between said Mrs. Wyly and defendant, that this defendant should pay Mrs. Wyly ten per cent on the five thousand dollars loaned, which said debt was made to secure, and that said defendant should pay said Mrs. Wyly interest on the annual installments of interest, which contract made the interest which defendant should pay to said Mrs. Wyly more than 12% per annum, which contract was not in writing; for which reason said deed is void."

(6.) Because the court erred in striking, on motion of plaintiff's counsel, that portion of the plea which set up usury.

The motion was overruled, and defendant excepted.

NEEL, CONNOR & NEEL, for plaintiff in error.

M. L. JOHNSON; McCUTCHEN & SHUMATE, for defendants.

JACKSON, Chief Justice.

An action of ejectment in the common law form was

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brought by Johnson against Wofford, laying two demises, one in the name of Mrs. Wyly and the other in his own. The plaintiff showed absolute deed in fee to the land from Wofford to Mrs. Wyly, and from her to him, and of course was entitled to recover without more. The defendant set up an equitable plea, setting up the fact that the deed, read in connection with an obligation from Mrs. Wyly to him, which he exhibited, made an equitable mortgage, and praying for an account to be taken to find the balance due on a five thousand dollar debt with interest, to secure which the deed, absolute on its face, was given. The prayer was that the balance due be made by sale of the land under equitable foreclosure, and the balance that the land brought after paying the debt be turned over to defendant.

Subsequently this prayer was changed. It was withdrawn and another made, that the plaintiff be allowed to recover the land only for the purpose of making his money out of it, after the account settled what was due, and then providing for its delivery back to the defendant. The defendant alleged inability to pay outside of the land, as the reason why he did not tender what was due on the debt, but was willing to pay out of the rents, issues and profits thereof the sum equitably due.

The defendant also pleaded that the contract obligation of Mrs. Wyly, in so far as it stipulated for interest at ten per cent, was usurious, not being signed by himself, and the money on which the usury was exacted being the consideration for the deed, infected the deed with usury, and rendered the title void, and defeated the plaintiff's right to recover in ejectment. Various payments and sets-off were also pleaded.

The jury found for the plaintiff the premises in dispute, settled the debt due by defendant at \$7,000.00, and allowed him ninety days in which to pay it, and have the land back, and in default thereof barred the equity of redemption forever. The court decreed accordingly.

The defendant moved for a new trial, and its denial on

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certain grounds set out in the motion therefor is assigned for error here.

1. Unquestionably the deed and obligation to re-convey on payment of the debt, as stipulated in the obligation of Mrs. Wyly to General Wofford, make an equitable mortgage and quite a peculiar equitable mortgage. No time was stipulated for the payment of the sum of five thousand dollars, to secure which title to the land passed, but it was left indefinite, and the loan was for an indefinite time, which was to be determined or fixed by agreement. Neither party was at liberty to fix that time. It required the concurrence of both minds to the original contract for an indefinite loan to be converted into a loan for a fixed period, and if Wofford had paid regularly the annual interest of five hundred dollars, it seems clear that Mrs. Wyly could not have precipitated the time of payment without recourse to some court, upon allegations and proof of the perilous condition of the investment, or other good reason for annulling the indefinite time of payment and making it immediate or certain. By the agreement, however, the title was put in her to the land. By itself, it was a naked legal title. She conveyed it to Johnson. He took it subject to all equities between the parties, for he knew all about the agreement. And he can do nothing that Mrs. Wyly could not do. He cannot recover the land, except upon the same terms she could, whenever those equities are set up.

2. But it devolves upon Wofford to set them up. He has parted with the legal title. On that title, Mrs. Wyly could have recovered, and Johnson can. Demises here are laid in the names of each. On each there could be a recovery of the premises in dispute, if nothing was shown by defendant to the contrary. Hence the necessities of the case force him to set up the paper which converts the legal title into an equitable mortgage. That paper is his reliance, and his only reliance, to save himself from being legally ejected from the land. Being thus forced to rely

on this paper to retain the premises on the terms it prescribes, having himself produced and exhibited it, how can he equitably attack the deed as usurious, because he did not sign it? If the law made ten per cent interest usurious, unless the promissor or debtor signed the contract, yet even then, if to get equity he invoked a court of equity to help him, because of a contract he made with the other party, he must take all or none of it. He cannot select what suits him and annul what does not. Setting up the contract as his defence in equity to the action of ejectment, he sets it all up, ten per cent interest to be paid annually and all; and when he signs his equitable plea acknowledging in that judicial writing that he did agree to pay it, he has promised *in judicio* to do so, and that in a sworn plea, and equity, having his written acknowledgment, in consideration that she relieve him, will not allow him to say, "I promised, but I did not in that other writing, because my name is not signed to it." Her reply to him will be, that he relies upon it, that his whole case turns upon it, and he must stand with it as an entirety, or he cannot stand erect before her; and only the erect posture becomes him who asks her aid. But the act of 1875 (see acts of 1875, 105), under which this arrangement was made, does not require that the paper be signed by the debtor; the rate of interest need only be specified in writing. This is specified in the hand-writing of defendant, and signed by Mrs. Wyly, who agreed to lend him the money on those terms. It would seem to be a valid contract in writing by the parties, without the necessity of invoking the equitable doctrine of estoppel, before applied to the defendant's having set up the instrument in his plea. Therefore there is no equity or law in the plea of failure of title, because the consideration of the deed was usurious, and the court was right so to rule.

3. The rate of interest at ten per cent upon the principal debt was fixed by contract, but we cannot see that by the contract the same rate of interest attached to the an-

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nual interest of five hundred dollars, if not paid at the end of the year. There is nothing in the contract going to show that such was the understanding. The law does not favor interest upon interest, except in special cases of fiduciary trust, or something of that sort; in cases where it is contracted for at higher rates than seven per cent, the contract must plainly show the liability. Therefore the court was wrong to charge that the annual installment of five hundred dollars, due at ten per cent interest on the principal debt of five thousand dollars, bore interest, if not paid, at ten per cent, until paid. Counsel for defendant in error seems to admit this, and has tried to rectify the error by writing off, or trying to write off, the excess of three per cent.

4. But another serious question occurs to us in this matter of interest on the annual interest. Conceding that, in a case of this sort, it is right and legal, under this contract, to allow it at seven per cent, up to what time is it to be counted? No definite time was fixed for the payment of the principal, but it was to be fixed by the parties to suit them. It never was so fixed. The agreement set up by defendant was not negotiable. When Mrs. Wyly sold the land, and consequently the debt, she abrogated the contract, in so far as the payment, the punctual payment, annually of five hundred dollars was stipulated therein, so as to contradict the general rule that interest shall not bear interest. She and Wofford were to fix the time that this loan, indefinite in duration, should determine and become definite; not Johnson and Wofford, or any other assignee of hers and Wofford. And this payment of interest upon interest was to continue only up to that time. Certainly, it would seem, when Wofford was sued for the land, when the contract, without his assent as to time to pay the principal debt, was ignored, when no suit was brought on that contract for his breach of it, and equities thereon were not invoked at all, but ejectment for the land itself, the retention of which entered into the stipulation

for the annual payment of five hundred dollars as interest, and thus for legal interest in the nature of damages for non-payment thereof every year, was brought, it would seem, in such a case, that this interest would not longer bear interest. Land was demanded. The pound of flesh must be delivered, it is true; but the bloody interest upon interest, which so rapidly depletes the financial veins, ought, on the naked, cold demand for flesh at law, to be staunched in equity. We think, therefore, that when this indefinite loan upon stipulated terms was repudiated by one party and made definite by her own act, and suit was brought for the land without reference to the loan at all, or the equities of the agreement to convey back, then the stipulation implied legitimately from the whole contract, including that of indefiniteness of time of duration of loan, to pay interest upon interest, ought in equity to cease. This would be most clearly so, and might be extended to embrace other equities, if Wofford himself had been punctual; but there is no provision that the principal shall fall due whenever this annual interest is not punctually paid, at the option of Mrs. Wyly alone. On the contrary, it would seem from the contract that, in any contingency which made it desirable to fix a limit in time to the loan, both parties should be consulted, confer and act together. Therefore, when one alone acted, we think the better equity is that she lose at least this hard rule of compound interest *quoad hoc*, as to the interest on annual interest.

Of course the interest at ten per cent will continue to run, so far as the principal debt is concerned, until paid.

5. We do not see how this verdict and decree can stand, in the state of the pleadings, as we understand them. The defendant's pleas as to usury and invoking the recovery of the land by the plaintiff to enjoy the rents, issues and profits, were stricken by the court.

We have held that the plea of usury was properly stricken. We think that the other was also properly stricken. The true equity is to sell the land, pay the debt

out of the proceeds, and turn over the balance of the fund, if any, to Wofford; if the land does not bring enough to pay the debt, then pay it as far as it goes, and give a money decree against Wofford for the balance. So far as this verdict and decree are concerned, as they now stand, if Wofford does not redeem in three months, his equity of redemption is gone, but there is no provision that the debt against him be extinguished in whole or in part. His land is gone, but the debt is open against him.

The verdict and decree do not fix the value of the land. The verdict does not say what it is worth, so as to extinguish the debt or credit it; nor does it say that plaintiff shall take it as an extinguishment of the debt. It does not cover, therefore, the issue of fact necessary to a decree, even if the pleadings allowed it. .

When defendant's equitable plea was stricken, what remained on which to base the verdict? The prayer for the sale was withdrawn, and thus it looks as if nothing remained. If anything did remain in the pleadings to authorize the jury to set off the land against the debt, unless paid in three months, they have not done it. The jury and the court leave the defendant minus his land, with the debt against him not settled by either.

We think that the old English mode of entry and working out the debt of the mortgagor by the mortgagee has been practically exploded, in equity as well as at law, under our system. The remedy by extent upon real estate has never been applied in Georgia, within our knowledge.

If the prayer of defendant had been granted, it would involve constant trouble and dispute, and more litigation, the very circuits and multiplicity of which equity does not favor. It would not settle the contest. An equitable sale of the property, and payment first of this debt out of it, if enough, and balance to defendant, if more; if not enough, credit and money decree for balance, is the true way to settle this controversy. It is the only way to do it completely and by one decree. If defendant does not

make such a defence and prayer, then the law will take away his land, and a naked verdict for the premises in dispute is the only legal verdict. What rights and remedies he may afterwards have are for the consideration of his counsel. It is for them to see, if visible, the advantage of giving up the land, and then suing, in the teeth of the old adage that possession is nine points in law, if, indeed, putting in and then withdrawing an equitable plea in this case might not be an obstacle in their way.

On the whole, our conclusion is that the only legal verdict would have been for the premises in dispute, under the pleadings as they stood; but as the jury went on and adjudicated a debt, the sum due on it, and provided for its payment in a certain time, and if not paid, barred the equity of redemption on the part of defendant, and neither fixed the value of the land nor extinguished or credited the debt of defendant, we are constrained, in sheer justice, and in regard—slight regard—to some degree of pleading, to set aside the verdict and to award a new trial; and it is so ordered.

We do not mean to say that, on proper pleadings by defendant, the verdict and decree might not fix a reasonable time within which he be allowed to pay the amount found due before the compulsory sale in equity, if it should be thought reasonable delay has not been already exhausted; but we do mean to say that, at some time in the range of reason, this debt should be paid by the sale of this land, and this controversy and litigation be thus settled.

Judgment reversed.

Cited for plaintiff in error, Acts of 1875, p. 105; 7 Wait's Act. and Def., 52; Brown's Stat. Frauds, §§355, 366; 3 Pars. Con., p. 4, 5; 25 *Ga.*, 391; 50 *Id.*, 644; 25 Am. R., 543, n.; 30 Am. R., 388; 3 Pars., 6 and 7. (N. E.); 1 Wait's Act. and Def. p. 113; Brown Fr., 357; Code, §2057; 5 *Ga.*, 33; 49 *Id.*, 514; 54 *Id.*, 554; 55 *Id.*, 412, 691; 59 *Id.*, 616; 63 *Id.*, 31, 96; 64 *Id.*, 71; 66 *Id.*, 398, 584; 56 *Id.*,

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33; 1 Story Eq. Jur., 64, E. 30, 302; 20 Am. R., 756; 11 *Id.*, 227; 2 Story Eq. Jur., §1018, 1018 c, 1019; 55 *Ga.*, 650-5; 57 *Id.*, 601, 605; Pom. Eq. Jur., 1227; 2 Jones on Mort., 1557, 1561, 1571-2.

For defendant in error, 3 Pars. Con., p. 5, 6, 8, 9, 10; Story, 1015 n.; Brown on Fr., 357; Bishop on Con., §§167, 173; 64 *Ga.*, 492; 25 *Id.*, 391; 61 *Id.*, 275; 37 *Id.*, 384; 57 *Id.*, 60, 61, 601; 61 *Id.*, 458; 54 *Id.*, 45; 64 *Id.*, 492; 11 Barb., 80, 90; 61 *Ga.*, 275; 37 *Id.*, 384; Code, §§2056, 3085; 4 Johns. Ch., 140; 63 *Ga.*, 159; 61 *Id.*, 400; 60 *Id.*, 558; 59 *Id.*, 507; 55 *Id.*, 650.

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1. Where the remedy at law is not as full, complete and adequate as it is in equity, this will not deprive equity of jurisdiction, although there may exist a common law remedy.
2. A landlord having foreclosed a mortgage in the county of the residence of his tenant, which was different from the county where the rented premises were and where the landlord lived, claiming divers sums of money of the tenant for breaches of the covenants contained in the lease, and the tenant having filed a bill denying that he was indebted to the landlord anything, but alleging that the latter was indebted to him a large sum of money on account of his failure to keep his covenants in said lease, the foreclosure of the mortgage and the bill embraced all matters between the parties growing out of this lease; and the remedy in this case was more full and adequate in equity than at law.
3. Equity seeks always to do complete justice, and having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject-matter of the suit, provided the court has jurisdiction for that purpose.
4. The plaintiff having sought to foreclose his mortgage against the defendant in the superior court of the county of the residence of the latter, which was a county other than that where the leased premises were located and where the plaintiff lived, claiming divers sums for a breach of the covenants contained in the lease, and thus having to some extent gone outside of the statutory remedies provided for landlords in the collection of rents against their tenants, the whole subject-matter of the lease, the covenants of the parties thereto and the breaches thereof are before that court,

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and the same cannot be inquired into and disposed of as well in law as in equity.

(a.) The superior court, in which it was sought to foreclose the mortgage, as a court of equity, has jurisdiction to hear and determine all the matters between the parties in this case; and for the purpose of doing full and complete justice, it has jurisdiction to enjoin any actions or suits between the parties growing out of the lease.

HALL, J., concurred on special grounds.

JACKSON, C. J., dissented.

April 15, 1881.

Landlord and Tenant. Jurisdiction. Equity. Before Judge SIMMONS. Bibb Superior Court. October Term, 1883.

W. A. Huff filed his bill in Bibb county against William Markham, of Fulton county, alleging, in brief, as follows: On October 16, 1879, Huff, in connection with P. F. Brown, as his partner, leased from Markham a hotel in Atlanta, known as the Markham House, for \$10,000.00 per annum, payable semi-monthly, if Markham so desired. The contract of lease was as follows:

. "Said William Markham rents and leases to said Huff & Brown the property known as the Markham House, in the city of Atlanta, Ga., on the lot extending from Loyd street back to a line five feet beyond the present back fence and parallel with it, the rent or lease to continue for five years from the 18th day of October, 1879, with the privilege given to said Huff & Brown of renewing or continuing the same for five years longer at the same price and on the same conditions. The said Huff & Brown agree to pay said Markham for said Markham House and furniture contained therein ten thousand dollars (\$10,000.00) per annum, payment to be made monthly, say on the 5th day of each month for the preceding month, and each payment to be the sum of eight hundred and thirty-three $\frac{33}{100}$ dollars (\$833.33). The first payment to be made on the 5th day of next November, and which will be for the fractional part of the present month, say from the 18th of October inst. to the first of next November. The said Huff & Brown are to use the house for hotel purposes and no other. They are to take the hotel and furniture in its present condition and keep it in like condition, the natural wear and tear excepted, and at the expiration of the lease to return it in like condition. It is understood that the bedding, table-linen, towels, curtains, carpets, etc., are to be kept up and returned in condition as now re-

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ceived, an inventory of which is to be made and kept as a part of this contract. And the said Huff & Brown shall have the privilege of buying the inventoried property for the sum of twelve thousand dollars (\$12,000.00) at any time during the first twelve months of this lease. And if such purchase shall be made, then the annual rent of the Markham House shall be reduced to eight thousand five hundred dollars (\$8,500) per annum, and be paid in like monthly installments, as before mentioned. The said Huff & Brown are to keep the house neatly painted and kalsomined on the inside and to keep the wells and pumps in good order; also to keep the gas and water-pipes, plumbing and cooking apparatus, etc., in good repair. It is fully agreed that the Markham House shall be kept in every respect as a first-class hotel. (Markham reserved the use of certain rooms and certain other privileges, not material here. Provision is made in case of the death of any one of the parties, or of the destruction or injury of the hotel by fire or storm.) The said Huff & Brown are to run the house at their own expense and pay for gas and city water that they use, having the right to use the water on the premises as they please. The said Markham hereby agrees to place a marble tiling floor in the office, and to face the front of brick columns with iron casing as far up as the rock partition in the middle of the column, and to give possession of the office now occupied by J. C. Peck within the next thirty days. The tiling to be laid within nine months from this date, and the facing of the brick columns to be done within nine months. The (said) Markham also agrees to repair the steam boiler in the kitchen by putting in new flues and whatever else may be necessary to render it safe and in a good working condition. The said Markham hereby agrees to keep the outside of the building properly painted and to keep the roof in proper condition, etc."

Below this appears the following:

“ATLANTA, September 20, 1880.

“The said Markham within named having reduced the rent on the within lease or contract for the first year to seven thousand (\$7,000.00) dollars, now agrees to reduce the rent for the second year, and no longer, to seven thousand five hundred dollars (\$7,500.00), and the rent to be paid monthly as heretofore and as specified in the within contract or lease. It is also agreed that the putting down of the tiling in the office room named in the within contract is not to be done during the second year. The balance of the within contract or lease to remain in force against all the parties. The said P. F. Brown, of the firm of Huff & Brown, is to remain at said Markham House during the said second year, and give the business his personal attention.”

Afterwards, on July 19, 1881, Huff assumed the entire responsibility of the lease, Brown selling out to him and retiring. Huff and Markham then executed a contract as follows:

"Whereas, on the 16th day of October, 1879, William Markham entered into a contract with W. A. Huff and Philip F. Brown, whereby the said Markham leased to the said Huff & Brown the Markham House hotel property, which contract is in writing, signed by all of the parties, and for greater certainty as to its provisions, the same is hereby referred to.

"And whereas, the said Brown has sold to the said Huff his interest in and under said lease, the said Huff having agreed with said Brown to fully carry out said contract with said Markham in every particular; and whereas, the said Huff desires to continue to run the said hotel under said original contract for the unexpired term called for therein: Now, this contract entered into this the 19th day of July, A. D. 1881, by and between William Markham and William A. Huff, witnesseth that in consideration of the premises and in consideration of the benefit accruing to, and to be derived by, said Huff, by reason of said Markham consenting that said Huff may individually run said hotel business under said original contract, and that said Brown may retire from the management of said business, and that said Markham shall look to said Huff alone for the future performance of said contract, the said Huff hereby agrees and contracts to carry out and fully perform all the covenants and agreements and stipulations specified in said original contract in as full and ample manner as the said Huff & Brown would have been bound to perform the same, had there been no change in the management and copartnership of said hotel. To secure the full and complete performance of said original contract as (on the) part of said Huff. . . . (Huff here gave to Markham a mortgage on certain personal property, and also on certain realty).

. . . . "It is distinctly understood and agreed that the taking of this mortgage by said Markham shall in no way affect the right of said Markham as against said Huff under said original contract, and said Markham may use all the remedies for the enforcement of said contract given to landlords under the law of said state, in case said contract is not complied with, etc.

"And the said Markham hereby obligates himself to said Huff to carry out and fully perform all the obligations mentioned in said original contract, the same as he would have been bound to do had the said Huff & Brown continued to run said hotel jointly."

Under the first contract, he and Brown entered into possession, and after the retirement of Brown, he continued in

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possession until the present time. The rents were regularly paid until October 18, 1882, when, on account of the injurious and counter-claims hereinafter stated, he refused to pay the monthly rents, insisting that Markham had no right to collect them until he should have responded for the injuries hereafter stated, the damages arising from which were placed at \$25,000.00. From the time of the refusal to pay rent to the filing of the bill, even if no recoupment were allowed, the amount due to Markham would be less than \$7,000.00. On January 5, 1883, Markham sued out and placed in the hands of the sheriff of Fulton county a process to dispossess Huff as a tenant holding over, for non-payment of rent, claiming that \$1,536.86 was due. Huff filed a counter-affidavit and gave bond, and the proceeding was returned to Fulton superior court for trial. On March 5, 1883, Markham sued out a similar process, claiming the sum of \$1,600.00 to be due for rent from January 3 to March 5. Another counter-affidavit was filed and bond given, and the case returned to Fulton superior court for trial. When the first proceeding was instituted, application was made to the judge of the superior court of the Atlanta circuit for injunction, on the ground, among others, that Markham could and would institute monthly or semi-monthly the same kind of proceeding, and annoy and harass Huff with a multiplicity of suits growing out of the same matter. On the hearing of the application for injunction, counsel for Markham insisted that there could be no other such proceeding, but that the whole claim for rent up to the time of the trial was involved in that proceeding. The injunction was refused, whether on that ground alone complainant is unable to tell. Complainant is not indebted to Markham any sum whatever; but Markham has injured him by breach of his cross-covenants in the sum of \$25,000.00. He failed and refused to repair and put in order the range mentioned in the lease, and compelled complainant to purchase and put up one at an expense of \$600.00. Complainant has

also built a kitchen or cooking apparatus at a cost of \$1,000.00, which was absolutely necessary, and which Markham agreed to do, but refused to comply with his agreement. Markham has also refused, up to the present time, to put down the marble tiling, notwithstanding he well knew that his agreement to do so was one of the main inducements to the lease, and though it was stated that complainant would not have the hotel without the tiling was put down. The damage is alleged to be \$10,000. Markham has further refused to paint the outside of the hotel, though four years of the time have expired. The outside of the building is old and dingy in appearance, and unattractive to guests and visitors. The damage is set at \$5,000.00. Markham has further refused to keep the roof from leaking, or to repair the same, although he has full knowledge that it leaks in a great many places, damaging the walls and furniture, and driving the guests into other parts of the building. The damage is set at \$3,000.00.

Complainant alleges that he has put into the house about \$21,000.00 worth of property and decorative improvements. When he entered the hotel, the inner walls were poorly painted and were old and dingy; most of the lamps were cheap, common and badly worn; there was no suitable range and kitchen, and new rooms were needed for visitors and guests. Complainant purchased and put down carpets of superior quality, painted the inner walls in oil, and frescoed the office and arcade at great expense, built a kitchen, furnished a range, and built and furnished eight new rooms, besides purchasing many other things, such as linen, towels, curtains, and, in fact, everything necessary to the use of a first-class hotel, amounting in the aggregate to \$21,000.00. All of this property is now in the hotel, ordinary wear and tear excepted; and if complainant is ejected, Markham will become improperly possessed of the property so purchased, and obtain the benefit of the improvements so made; and this complainant believes to be his object.

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Complainant alleges that, on May 29, 1883, Markham made affidavit, claiming double rents from January 3, 1883, covering the period for which complainant had already given bond and filed a counter-affidavit. In this last proceeding, Markham claims over \$8,000.00, of which \$1,900.00 is for single rent to January 3, 1883, and \$7,000.00 for double rent after that time. This proceeding was placed in the hands of the sheriff of Fulton county, and contemporaneously Markham foreclosed the mortgage held by him on the personal property of complainant, and caused the clerk of Bibb superior court to issue a mortgage *fi. fa.* This he threatens to levy at once on all the personalty covered by it, and to advertise and sell the same. If he is allowed to do so, it will effectually prevent complainant from continuing and carrying on his business, and will work irreparable injury to him. The affidavit of foreclosure made by Markham was as follows:

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Personally appeared before me, Matt. R. Freeman, a notary public and *ex-officio* justice of the peace in and for said county, William Markham, who, on oath, says that William A. Huff, of said county, is indebted to him on the annexed mortgage the sum of nine thousand five hundred and thirty-seven and 89-100 dollars, besides interest, said sum being made up of the following items, to-wit: \$763.32 for rent under its lease mentioned in the annexed contract, and due November 18, 1882; \$380.66 rent due under said lease December 3, 1882; \$393.89 for rent under same lease due December 18, 1882; \$389.77 for rent due January 3, 1883, each of said sums bearing interest from time same became due as above; also the following sums, in part of first named sums, to-wit: Ten thousand dollars for damage and injury by said Huff to the furniture, carpets, crockery, table-ware, linen, bed and table linen, bedding, silverware and other things included in the inventory referred to as part of the contract in the said mortgage and lease; also five thousand damage and injury caused to said Markham, by damage to the general character and reputation of the said hotel, by said Huff failing to comply with his contract to keep up the same as a first-class hotel, and letting it run down in character by his negligence and inattention to the same; all such amounts and interest as aforesaid, and now justly due to deponent.”

Each of these items complainant denies, and charges that Markham has injured him as already stated.

The prayer was for an injunction to restrain Markham from proceeding under the foreclosure of the mortgage, or from proceeding to evict complainant as a tenant holding over for double rent; that an account of the claims of the parties be had, and decree be entered for the amount due complainant; that, in order to prevent a multiplicity of suits, all suits and proceedings touching the lease-contract and rent claims be enjoined, and that all matters in dispute be determined on the trial of this bill.

Attached to the bill as exhibits were the original contract of lease, the second or renewed contract, the affidavit of Markham foreclosing the mortgage, and the mortgage itself, all of which are set out above.

Defendant demurred to the bill for want of equity, and because there was an adequate common law remedy. He also demurred to that portion of the bill relating to damages from failure to put down marble tiling in the office, to paint the outside of the building and to keep the roof in repair, because the allegations concerning them were too general; also to the allegations concerning the expenditure of \$21,000.00 by plaintiff, because they were insufficient to warrant a recovery; also to the bill, because the copies of the mortgage *fi. fa.* and the statutory proceedings pending in Fulton superior court were not exhibited thereto; also to all parts of the bill not strictly defensive to the foreclosure of the mortgage, because the sole defendant to the bill resides in Fulton county, while the bill is filed in Bibb county, because the proceedings pending in Fulton county are for the recovery of real estate, and the superior court of that county alone has jurisdiction, and the question of the liability for double rent is not involved in the defence to the mortgage.

The court overruled the demurrers, and defendant excepted.

E. N. BROYLES; LANIER & ANDERSON, for plaintiff in error.

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LYON & GRESHAM ; W. A. HAWKINS, for defendant.

BLANDFORD, Justice.

1, 2, 3. Where the remedy at law is not as full, complete and adequate as it is in equity, this will not deprive equity of jurisdiction, although there may exist a common law remedy. Code, §3095. See 35 *Ga.*, 261; *Id.*, 216; 16 *Id.*, 66; 36 *Id.*, 545; 8 *Id.*, 459. These cases fully sustain and illustrate the principle stated.

Looking at the facts of this case, plaintiff in error has foreclosed a mortgage in Bibb superior court upon the property of defendant, wherein he claims divers sums of money of defendant for breaches of the covenants contained in the lease of the Markham House; defendant denies these breaches, and contends that he is not indebted to the plaintiff anything, but that, on the contrary, plaintiff is indebted to him a large sum of money on account of his failure to keep his covenants in said lease. The foreclosure of the mortgage by the plaintiff and the bill filed by the defendant embrace all matters between the parties growing out of this lease, so that it appears to us that the remedy is more full and adequate in equity than at law. Equity seeks always to do complete justice; hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject-matter of the suit, provided the courts have jurisdiction for that purpose. Code, §3085.

4. The plaintiff in error having sought to foreclose his mortgage against defendant in error in the superior court of Bibb county, in which he claimed divers sums for a breach of the covenants contained in the lease, thus having to some extent gone out of the statutory remedies provided for landlords in the collection of rents against their tenants, the whole subject-matter of the lease, the covenants of the parties thereto and the breaches thereof are before that court, and the same cannot be inquired into and disposed of at law as well as in a court of equity.

The superior court of Bibb county, as a court of equity, has jurisdiction to hear and determine all such matters between the parties in this case, and for the purpose of doing full and complete justice, that court has jurisdiction to enjoin any actions or suits between said parties growing out of said lease. Without this power, the court could not do full and complete justice between the parties.

The plaintiff in error having appealed to the superior court of Bibb county and submitted to its jurisdiction in seeking to foreclose his mortgage against the defendant, will have also to submit to the equitable jurisdiction of that court when invoked by his adversary, when it is shown that this exercise of jurisdiction is necessary to afford an adequate, full and complete remedy, and the same is necessary to do complete justice between the parties in this case, and that court will proceed to give full relief to the parties in reference to all matters growing out of said mortgage, the subject of the suit, and settle by one decree the numerous issues between the parties growing out of the lease.

When a person goes out of the county of his residence, and seeks relief at law against another in the county of the latter's residence, in such case, when it may become necessary, according to the principles of equity, to adjust the matters in controversy between the parties to said action at law, at the instance of the defendant, the superior court having jurisdiction of said action at law, may, as a court of equity, entertain a bill, and may decree and grant full and complete relief to the parties before it, and has jurisdiction to grant relief against the plaintiff in the action at law, although he may not reside in the county where such bill is filed, his conduct in appealing to said court is equivalent to consenting to the jurisdiction of the same, as to all matters growing out of said action at law.

In this case, there is equity in the bill of defendant in error, and the superior court of Bibb county, as a court of equity, has jurisdiction of the same, and the decree of the

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court overruling the demurrer of the plaintiff in error and sustaining the bill is hereby affirmed.

HALL, Justice, concurred specially, but furnished no written opinion. He based his concurrence on the special facts of this case.

JACKSON, Chief Justice, dissenting.

I dissent from the judgment of the majority of the court, affirming the judgment of the superior court, because the case is *res adjudicata* adversely to that judgment. It is due to the court below to say that the point making it *res adjudicata* had not been adjudicated when the demurrer to the present bill was overruled by that court; but after that court had decided on the bill now before us, a bill precisely like this, between the same parties, was dismissed by the superior court of Fulton county, and that judgment of dismissal was affirmed by this court on demurrer thereto, on the ground that there was no equity in it. If there was no equity in this case when brought here from Fulton, there certainly can be none in it when brought here from Bibb.*

If Fulton superior court had judication, its judgment affirmed by this court concludes the parties. That Fulton superior court did have jurisdiction is indisputable, because Markham, the defendant to the bill, and the only defendant to it, resides in Fulton. Therefore, if the bill now before us from Bibb be the same bill which was before us from Fulton last term, Huff is concluded by the judgment in Fulton superior court affirmed here last term.

Is it the same bill? It is the identical bill now before us. It raises the same issues, invokes the same relief, and prays for the same damages. There is but one point of difference between the two, and that is that Markham sued Huff in Bibb superior court to foreclose a mortgage on real estate there, given to secure the rent of the hotel,

*71 Ga., 555.

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and this bill now before us was filed to enjoin that foreclosure and for relief against Markham for failure on his part to comply with the terms of the lease, to the great damage of Huff; whereas in the case from Fulton, the mortgage on realty in Bibb was of course not involved. Bibb county acquired jurisdiction by reason of Markham's suing Huff there, so far as to defend that suit, and to stay proceedings to foreclose, but not to give a decree for damages against Markham, unless strictly springing out of that mortgage, the suit to foreclose which gave jurisdiction to the Bibb court.

So that, when it was decided that Huff had no equity against Markham to stop the collection of his rent overdue, by this court, in the case from Fulton, which county had full and complete jurisdiction, the effect of that decision is that he had no equity to stop the mortgage in Bibb, to collect the same rent—the equitable facts alleged in the two bills being precisely the same.

The judgment from which I dissent reaches the remarkable result that a court having only partial jurisdiction of the person of the defendant, to-wit, to grant complainant relief, stopping the mortgage process until certain equities could be adjusted, can overrule a decision in another court, between the same parties, which had complete jurisdiction of the whole case for all equitable purposes; and thus the less jurisdiction would possess not only greater powers, but powers unheard of before in any court, of reversing a judgment between the same parties on the same allegations of equity.

It is vain to reply that, in the case when here from Fulton, the landlord was pursuing his statutory rights to eject the tenant for non-payment of rents, whereas in Bibb he was enforcing a lien to secure those rents. No substantial distinction exists between the two remedies, so far as equitable rights to stop the landlord are concerned. If he has such rights, not springing out of the mortgage alone, but out of the lease, equity would interpose as soon to suspend

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the collection of the rent notes by the ordinary mode as by their collection by the foreclosure of the mortgage. If the tenant had no equity to deny payment of the notes he gave for the lease of the hotel, it is very hard to find an equity he would have to deny payment of the same notes secured by mortgage, unless that equity sprang directly out of the mortgage, independently of the lease, of which there is no pretense. The very same equity which the tenant set up against the notes, to-wit, the damages done him by the landlord's breach of the covenants of the lease, is the equity, and the only equity, which he now sets up against the mortgage.

But to make assurance doubly sure, it is expressly stipulated in the lease itself that the taking the mortgage, with all the rights and remedies therein given, shall not, in the slightest degree, affect the rights and remedies of the landlord. So that, whatever right he had to collect the notes by the proceeding under the statute, over any so-called equities which Huff might set up, Markham reserved the same in respect to the collection of the mortgage. The original lease was made to Brown & Huff, and Huff bought out Brown, and to get Markham's assent thereto, and to make him as secure as if Brown had remained one of the lessees, Huff gave the mortgage sued in Bibb superior court. Therein are these words: "It is distinctly understood and agreed that the taking of this mortgage by said Markham shall in no way affect the right of said Markham as against said Huff under said original contract, and said Markham may use all the remedies for the enforcement of said contract given to landlords under the law of said state in case said contract is not complied with," etc.

Yet, in the teeth of this agreement, of this solemn covenant, it is held by the majority of this court that a judgment affecting Markham's rights to the extent of allowing Huff equities, which, outside of the taking the mortgage, this court unanimously held, when the case was here from Fulton, Huff did not have, and enjoining Markham from

prosecuting in his own county, where the property leased lay, "all the remedies for the enforcement of said contract given to landlords under the law," be affirmed; and in so deciding, in my judgment, with great deference and respect to theirs, I must say it has not only reversed what a unanimous court between the same parties declared to be the law of the case here made at the very last term, but has annulled the agreement and covenant between the parties; and all this has been done, too, in violation of the spirit of the constitution, which gives to all men the right of trial in equity cases, if relief be substantially prayed against them, in their own counties. The effect of the decision is to transfer the whole case from Fulton, the residence of the defendant, to Bibb county, the residence of the complainant, contrary to the law and the constitution, as I interpret them.

Therefore, I put this dissent on record.

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1. If a ditch for mining purposes be cut through land by the owners thereof, for use in connection with mines upon such land, the sale of the land under execution will convey the ditch, although no express mention of it may be made in the levy or the deed; and the water in such ditch, which gives it its value for mining purposes, passes with it.
- (a.) Where the legislature chartered a company and authorized it to dig a ditch so as to convey the water from certain creeks to its mining lands, and the ditch was cut and used by the company, in a subsequent contest concerning the title thereto, the presumption would be that the company acquired in the mode prescribed by the charter the right to cut the ditch and convey the water over the lands of others after just compensation.
2. A tenant cannot dispute his landlord's title, and the title of the landlord is good against such tenant, or one holding under him with notice.
3. A bill was filed to recover certain property. The principal defendant filed a disclaimer of title as to the property, but asserted that it was the property of a corporation of which he was the president, and which it was prayed should be made a party, and that the acts

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complained of as his were really those of the company. The answer also set up certain acts of the complainant as injurious to the company, and claimed damages therefor. On demurrer, the court struck so much of the answer as related to the wrongful acts of the complainant. The individual defendant excepted; the company did not:

Held, that the ruling was not one which injured the plaintiff in error, and the company is not before this court.

4. Where an assignment of error is based on the refusal to admit certain statements of a tenant in possession, such assignment cannot be passed upon by this court, unless the statements are set out.
5. The rejection of the amended charter of the company was not a ruling which could injure the individual member excepting.
6. Nor could it hurt the individual plaintiff in error, who had disclaimed title to the property in controversy, that the court submitted to the jury the question, whether the evidence showed that the ditch was being used by the defendants *in fi. fa.* at the time of levy and sale or not.
7. Although it would have been better to have charged that one purchasing from a tenant with notice would be estopped from denying the title of the landlord, yet where it was clear that the defendant had notice, the omission to charge as to its necessity was not error which would require a reversal.
- (a.) Notice to the president of a corporation purchasing property is notice to the corporation.
8. Exception to a long paragraph of a charge containing numerous points, without specifying any error therein, is too general. The charge in this case was substantially right.
- (a.) One who disclaims all title to, or interest in, property sued for cannot be hurt by a recovery thereof by the complainant; and such a verdict furnishes no ground for a motion for new trial or exception to this court on his behalf.
- (b.) The law and facts sustain the verdict.

March 11, 1884.

Title. Deeds. Appurtenances. Mining. Landlord and Tenant. Estoppel. Vendor and Purchaser. Notice. Practice in Supreme Court. Corporations. Charge of Court. Before Judge ESTES. Lumpkin Superior Court. October Term, 1883.

Barlow filed a bill against White to recover possession of a water ditch in Lumpkin county, and to enjoin the defendant from interfering with it or cutting and taking wa-

ter from it. Defendant disclaimed title in himself, and asserted that he held as president of the Pigeon Roost Mining Company, and that the acts complained of were done as such, and it owned the property. He amended his answer by asking that the company be made a party, and alleging that complainant had constructed a "sluice-way and box" and ore-sheds, which interfered with the use of the property by the company, and that complainant had commenced suits which involved the title to the property, without the shadow of right, and to the injury of the company, and it was stated that the company therefore prayed damages, injunction, removal of the sheds, etc., and general relief.

The court, on demurrer, struck so much of the answers as set forth the injuries to the company from sluices, etc., and from the filing of the bill, and prayed damages and relief.

On the trial, the controlling points were as follows:

Barlow claimed the ditch and water under certain sheriff's deeds based, on *fi. fas.* against the Georgia Company in 1871. The levies were made on the lots by number, and the deeds conveyed the lots named with their rights, members and appurtenances, but neither the levy nor the deeds mentioned the ditch by name, and the sheriff testified that he did not levy on the ditch in terms, but levied on whatever went with the lots. It appeared that the Georgia Company was incorporated for mining purposes and empowered to cut this ditch, which was done, and the water conveyed to certain lots belonging to it, from which ore was "sluiced" to the mill; and the company and its agents controlled it for some years. The Pigeon Roost Company claimed by subsequent deeds, some of which specifically mentioned the ditch; and there was evidence of the use of the ditch for working other mines than that of the Georgia Company, but it was testified to be since the sale, or by consent of that company,

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and the question was, whether the ditch passed under the sheriff's deed.

There was also evidence to show that one Weaver held as a tenant under complainant, and that he and one Parker made a deed which was one of the muniments of title under which the Pigeon Roost Company claimed; also that White, the president of the Pigeon Roost Company, had notice of the claim of complainant before he bought.

The jury found for the complainant. Defendant moved for a new trial, on the following grounds:

(1.) Because the verdict was contrary to law, equity, evidence and the weight of evidence.

(2.) Because the court refused to allow the amendment offered by defendant in his cross-bill and answer, and sustained the demurrer to said amendment.

(3.) Because the court refused to permit the jury to render a verdict in favor of defendant, upon the conclusion of complainant's evidence, upon motion, the sheriff's deed and other evidence not showing any title in complainant.

(4.) Because the court refused to permit John A. Parker, a witness for the defendant, to testify as to the statements of John W. Weaver, agent and tenant of the complainant, as to the ownership of the ditch in dispute. [What statements it was desired to prove was not shown.]

(5.) Because the court rejected from evidence the amended charter of the Pigeon Roost Company granted by the superior court in 1880. [The object of this seems to have been to show a recognition of White and his associates as successors to the original corporators under the act of 1876, p. 247. The amendments made were entirely immaterial.]

(6.) Because the court refused the following request: "In your inquiry as to Barlow's title, as he claims title by virtue of a levy and sale and sheriff's deed, you will have said levy and deed before you. Look into them and see whether or not said levy and deed contain any legal specification of said ditch. If they do not, then no title to the

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ditch ever passed to Barlow by said deed. If you should be in doubt as to whether said levy and sale included the ditch, from the papers themselves, then you would be authorized to consider what J. P. Harrison, sheriff, testified as to whether the ditch was levied on or not. If it should appear the ditch was not levied on by the sheriff, then the sheriff could not sell or pass any title to Barlow, under said levy, no matter what may be stated in the sheriff's deed. Look into the evidence; if the ditch and the water therein were being used by three parties at that time on other property or lands not contained in said sheriff's deed to Barlow, then this ditch, in law, was not an appurtenance to said lands sold by the sheriff, and the title would not pass to Barlow."

(7.) Because the court charged as follows: "If the gold mill of the Georgia Company was on the property purchased by the complainant, and the ditch in dispute was used by the Georgia Company in connection with said mill in its mining operations, in washing down ore to said mill, the mere fact that any of said mining was done on other property was no reason why the ditch could not be an appurtenance to said mill and the lot on which it stood."

(8.) Because the court charged as follows: "If the jury find from the evidence that John W. Weaver was in possession and control or use of the ditch in dispute as a tenant or agent of Barlow at the time the said Weaver joined in the conveyance of said ditch to the Pigeon Roost Gold Mining Company, then the said Weaver would be estopped from denying that the complainant, Barlow, was the owner of this ditch, and the purchasers under Weaver would likewise be estopped from disputing the fact that Barlow was then the owner of the ditch in dispute."

(9.) Because the court charged as follows: "A water-ditch may be held, owned, used and possessed, bought and sold and levied on and sold as a separate and independent estate. But a water-ditch may also be an appurtenant or incident to another estate. So that a tract or parcel

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of land, when sold either at private or public sale, often carries with it many other things which are not mentioned. For instance, if a man sells a mill and describes it as a mill, the grant of a mill carries with it the head of water by which the mill is operated; so it also carries the right to flow the seller's land, and the whole right of water which had been previously used by the grantor. so it carries the flow of water in the race-way; and if it draws its principal supply of water from a reservoir on the same stream, at a distance above the mill, then the sale of the mill will convey also the upper dam and reservoir. In this case, you will inquire, by examining the title deeds in evidence and from all the other evidence in the case, what was sold to and what was bought by the plaintiff, L. M. Barlow. The plaintiff insists that the ditch in dispute was sold by the sheriff and bought by him, with the other property which he bought; that the ditch was an appurtenant or incident to the property and passed by his purchase. Now, in order to determine whether the ditch in question is an appurtenant or incident to the purchase of the plaintiff, Barlow, you will inquire what he did purchase, what was on it, what was it used for, what was the purpose for which it was before used, and what reasonable use it was likely to be put to, who made or dug the ditch, who used it, what was it dug for, what had it been used for, on what land was it used; did its use pertain to other property which Barlow, the plaintiff, bought; was the ditch necessary to the usual ordinary use and enjoyment of the other property? Had the Georgia Company, as whose property the plaintiff claimed it was sold, used the ditch or water? If so, what for? Was it necessary to ordinary, usual or convenient use of other property bought? These, and such as these, are pertinent inquiries to enable you to determine whether or not the ditch and its water now in dispute passed to Barlow by his purchase or not. If you believe from the evidence that the ditch in dispute had been made and used by those under whom he claims to work the gold

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mines or mills which were on lands bought by plaintiff, and that said ditch was necessary to the profitable convenient use and enjoyment of the other property he had bought, then it was an appurtenance or incident to the property, and if it was such an appurtenance or incident, then a purchase of the lands, mines and mills would convey with it the ditch also, and that, too, without a mention of it in the levy or the deed."

The motion was overruled, and defendant excepted.

WIER BOYD; M. G. BOYD, for plaintiff in error.

W. P. PRICE; R. H. BAKER; H. H. PERRY, for defendant.

JACKSON, Chief Justice.

We think that the evidence in this record shows very clearly title to this ditch in the Georgia Company. By the act of 1866, Pride, Barlow, and such others as should become associated with them as the Georgia Company for mining purpose, were empowered to cut this ditch. They did so and conveyed the water in it to their land, lots 726 and 727, and used it to "sluice the ore," to use the mining phrase, to their mill, which seems then to have been operated by steam; and the company, by its tenants, watchmen and servants, controlled it for some years. The company became indebted, judgments were rendered and executions were issued against them, and levied upon the lands to which the ditch conducted the water, and Barlow, the defendant in error, bought these lots of land with the rights, members and appurtenances thereof.

1. In so far as the ditch was cut through and upon the lands thus sold and conveyed by the sheriff, of course the title to the ditch cut thereon passed with the levy upon and title to the land, and it needed no express mention of the ditch, either in the levy or the deed, to carry with the land this ditch, any more than it would need a levy on a

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mill race or stream of living water, cut and spread out to irrigate the land, or any other improvement put on it, to include the sale and conveyance of such things with the land. The title to land embraces all on it to any height or depth.

And the water in the ditch makes its value for the purpose for which it was dug, to be employed in and about digging and washing the golden ore and extracting the pure metal therefrom.

Therefore, as the legislature empowered the Georgia Company to dig the ditch from certain creeks, the presumption is that it acquired, in the mode prescribed by the charter, the right to cut the ditch and convey the water over the land of others, after just compensation, and the water thus conveyed to and through the company's own lands became necessary to the great purpose of their charter—the working of their mine.—and thus the water in the ditch, which terminated in a reservoir of water on their land, became appurtenant to those lots; and thus the title to this necessary appurtenance to these gold lots passed as appurtenant to them by the sheriff's deed, though the levy and deed of the sheriff made no mention of the ditch in express terms. Washburne on Easements, 12, 15, 40, 42 *et seq.*, 77, 80, 291, 398; Angel on Water Courses, 10 Ed., par. 153 (a), 158, 159; *Imboden et al. vs. Etowah, etc., Co.*, 70 Ga., 86.

2. But if the plaintiff in error holds under Weaver, as appears in the record, and Weaver, as the testimony shows, used the water under the defendant in error and the Georgia Company, can he question the title of his landlord?

If such be the case, and the evidence is strong that it is, then it would seem that the tenant could not dispute the landlord's title, and thus also Barlow's title would be good against such tenant and one holding under him with notice, and the proof is positive that White had notice.

We are clear, therefore, that the court did not err in

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overruling the motion for a new trial on the 1st and 3d grounds of the motion.

3. Was there error which hurt the plaintiff in error in the second ground? It must be observed that the Pigeon Roost Mining Company is not a party to this writ of error. It is nowhere mentioned in it, and complains of nothing. Therefore, the question is, did the refusal of the court to allow the amendment, to the extent that the demurrer thereto went, hurt White? Certainly not, because he disclaims all title to the lots which were damaged, and the order of the court on the demurrer is not the denial of so much of it as makes the Pigeon Roost Company a party, but the set-off of damages.

The judgment on the demurrer is, "that so much of said answers as sets forth the injuries to respondents by reason of complainant's having constructed ore-sheds and sluice-ways on respondents' lands, and praying an injunction against them and for damages by said alleged injuries, and also for damages by reason of filing complainant's bill in this case, be stricken." The rest is all left, and the record is that the court precedes this judgment on the demurrer with these words: "Upon demurrer to the answer of George W. White, defendant, and of the Pigeon Roost Gold Mining Company. it is ordered that," etc., as just copied. By reference to the answers, it will be seen that the injunction prayed for and the damages asked all relate to the company, and not to the plaintiff in error, and that the plaintiff in error answers as follows: "That he does not own any interest or claim to the property described in the complainant's bill, but that the property described in said complainant's bill, as the property of this defendant, is the property of the Pigeon Roost Gold Mining Company, and this defendant, George W. White, hereby disclaims and renounces all title, claim or interest in or to the property described in said complainant's bill;" and further says, "that he is the president of the Pigeon Roost Gold Mining Company, and was such

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at the time of filing complainant's bill, and that the acts complained of were the acts of the said company by said George W. White as president."

So that this plaintiff in error, George W. White, was not hurt as an individual, and in that character alone he excepts and complains, and assigns error here.

4. The fourth ground cannot be passed on by us, because what statements Weaver made to witness are not set out, and it is impossible to decide whether the ruling them out hurt or not.

5. We cannot see how the amended charter could help or hurt the plaintiff in error, and of course a new trial cannot be granted because it was ruled out.

6. As plaintiff in error disclaimed all title to the ditch, we are unable to see how the 6th and 7th grounds, if wrong, could hurt him; but we think there is no error in either.

7. The eighth ground is that the court erred in charging that, if Weaver was in possession as tenant or agent of Barlow, and united in the conveyance to the Pigeon Roost Company, he would be estopped, and purchasers under him would likewise. It would have been better had the court added "with notice" after the word "purchasers," but as it is clear that White had notice, the charge did not hurt him, and if he was president of the company, notice to him was notice to it, if it were complaining here.

8. The ninth ground of the motion embraces a very large extract from the judge's charge, and does not specify any particular error therein. Under repeated rulings, we do not consider such grounds, because the statute requires that errors must be specially assigned, which is not done, by putting in a motion for a new trial many paragraphs of a charge, and singling out none as erroneous, or not specifying how all taken together are erroneous.

But if it were considered, we are unable to discover any error hurtful to the plaintiff in error, or any error hurtful to anybody therein. Substantially, it is right.

Carter, executrix, vs. Greer et al.; Horn vs. The Guiser Manufacturing Company.

In conclusion, we cannot understand how one who disclaims all title to, or interest in, the property sued for and recovered can be hurt by a verdict giving to a complainant that property; and if for no other reason, this judgment should be affirmed. We think, however, on a careful examination of the whole record, that the facts abundantly sustain the verdict, and the law therefore upholds it.

Judgment affirmed.

*CARTER, executrix, vs. GREER et al.**

1. When suit for the recovery of real estate is brought in the statutory form, the plaintiff will be confined to the abstract of title appended to the declaration under section 3401 of the Code.
2. The abstract of the title relied on in this case being the will of testator, and the assent of the executor to the legacy of the land sought to be recovered, that was the sole issue on trial made by the pleadings, and on that issue, there being sufficient evidence to sustain the verdict that the executor did not assent, and the presiding judge being satisfied with the verdict, this court is not empowered by law to interfere.
3. The plaintiff being permitted to recover only on the strength of his on title, and not on the weakness of the defendant's, and failing to show title under the will and assent of the executor, by possession with that assent as set out in the abstract, it becomes unnecessary to examine defendant's title and alleged errors of law assigned thereon.

Judgment affirmed.

April 8, 1884. (Head-notes by the court.)

JACKSON, Chief Justice.

HORN vs. THE GUISER MANUFACTURING COMPANY.

Where an affidavit is made by an agent or attorney to obtain an attachment, he may swear to the amount claimed to be due according to his best knowledge and belief, but the ground of attachment must be sworn to positively, and the language used must be such as not to leave it doubtful whether this requirement has been complied with.

*No full reports or opinions are published in the following cases, under the provisions of the act of March 2, 1875 (Rep.)

Willhelms vs. Partoine; Hobbs vs. Longstreet.

(a.) Where, in order to obtain an attachment for purchase money, an attorney at law made oath that the defendant, "to the best of his knowledge and belief, is indebted to the Guiser Manufacturing Company in the sum of eighty-three and $\frac{3}{8}$ dollars and interest thereon, from November 1st, 1882, at the rate of 8 per cent, the same being amount due on a note due November 1, 1882, given in part payment for a certain grain thresher or separator sold by said company to said Horn (defendant), known as the Empire Separator, made at Hagerstown, which separator is now in possession of said Horn, said amount is for purchase money for said separator," such affidavit was not sufficient.

(b.) This case distinguished from the case of the *Chronicle and Constitutionalist vs. Rowland* (last term.)

Judgment reversed.

March 11, 1884.

BLANDFORD, Justice.

WILLHELMS vs. PARTOINE.

That a promissory note concludes with the words, "witness our hand and seal," does not alone make the note a sealed instrument, without the addition of a seal or scroll. These words call attention to the attestation to be made, but do not supply the place of a seal or the representation thereof after the signature. *Brooks vs. Kisers*, 69 Ga., 762.

Judgment affirmed.

March 18, 1884.

BLANDFORD, Justice.

HOBBS vs. LONGSTREET.

1. Where exception is taken to the grant of a non-suit, the evidence should be brought up in the bill of exceptions; it is only where a motion for new trial is made that the evidence can be brought up in the record. Code, §4253.

2. No notice of any motion to dismiss was given, or motion made, but upon the discovery that the evidence was not in the bill of exceptions, but in the record, the court held that it would dismiss the writ of error. (Rep.)

Writ of error dismissed.

February 19, 1884.

JACKSON, Chief Justice.

Liddell, administrator, vs. Wright, administrator; Brooks vs. The State; etc.

LIDDELL, administrator, vs. WRIGHT, administrator.

The question being whether one who held under a bond for titles or its equivalent had paid all of the purchase money thereunder, and there being sufficient evidence to sustain the finding of the jury on that issue, this court will not control the discretion of the court below in refusing a new trial, on the ground that the verdict is contrary to law, evidence and the charge of the court.

- (a.) A promissory note having been produced from among the effects of a deceased debtor by his administrator, the presumption was that it had been paid, and the *onus* was on the party asserting the contrary to show it.

Judgment affirmed.

March 13, 1884.

JACKSON, Chief Justice.

BROOKS vs. THE STATE OF GEORGIA.

Where counsel for plaintiff in error was detained at home in another city from that where this court sits, at the time the case was called, on account of serious sickness in his family, and communicated that fact to the court, but the communication failed to reach it in time, and the case was dismissed for want of prosecution, a motion to reinstate it on that ground would be granted, if there were anything in the record which could benefit the party prosecuting the writ of error. But in the present case, the exception is to the refusal of a motion for new trial made after the close of the term of the trial, on the ground of newly discovered evidence to prove an *alibi*; and it appears that the testimony was neither in fact newly discovered nor was any diligence used in obtaining it. This court will therefore not do a vain thing by reinstating the case.

Motion to re-instate denied.

April 25, 1884.

HALL, Justice.

OGLETREE vs. SHARP, administrator, for use.

From the confused and imperfect state of this record and its contradiction of the bill of exceptions, it is impossible for this court to say with certainty what transpired in the court below, either upon the trial before the jury or the hearing of the motion or the steps leading to its consideration. It is incumbent on the party

O'Brien et al. vs. White; Strohecker, executor, vs. Dessau.

alleging error to show error, and if he fails to do so, an affirmance will result.

- (a.) There is no copy of the written evidence used on the trial, and this deficiency is, by the statement of the parties agreed on in writing here, attributed solely to the defendant's counsel, who was absent when the motion was perfected and heard. No satisfactory reason is given for his absence, but in consequence of his failure to attend, none of the questions made by the bill of exceptions were presented to and passed upon by the presiding judge at the hearing of the motion. This court has no jurisdiction to consider anything except the rulings, decisions and charges of the court below, nor can it determine an agreed case made up and brought here solely by parties or their counsel.

Judgment affirmed.

March 18, 1884.

HALL, Justice.

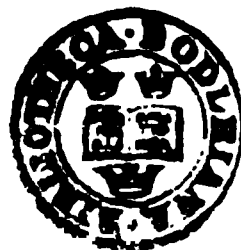
O'BRIEN et al. vs. WHITE.

1. There was no abuse of discretion in granting a first new trial in this case.
2. Questions not made and passed upon in the court below will not be decided by this court.

Judgment affirmed.

February 19, 1884.

HALL, Justice.



STROHECKER, executor, vs. DESSAU.

1. Where a motion was made to dismiss an appeal from the county court, which was pending in the superior court, on the ground that the papers sent up by the county court showed no judgment from which an appeal could be taken, the appellant should have suggested a diminution of the record and asked for a continuance or for such further time as would have enabled him to have had the record perfected. Failing to do this, and the record showing no judgment, a dismissal of the appeal was proper.
2. Where an appeal from the county court had been dismissed, on the ground that no judgment appeared in the record, and subsequently the appellant caused the record from the lower court to be perfected, and moved to set aside the judgment dismissing the

Hook vs. Teasley ; James vs. The State; Jackson vs. The State.

appeal and to re-instate the same, such a motion did not stand as a matter of right, but was largely addressed to the discretion of the court, and that discretion will not be controlled unless abused.
Judgment affirmed.

March 11, 1884

BLANDFORD, Justice.

HOOK vs. TEASLEY.

The mere absence of counsel for a defendant, with certain letters which would establish the defence set up, is not a sufficient ground for a continuance. 16 Ga., 526.

Judgment affirmed.

February 19, 1884.

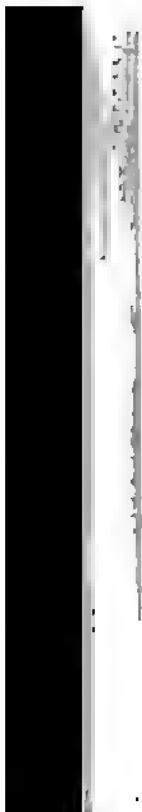
BLANDFORD, Justice.

JAMES vs. THE STATE OF GEORGIA; JACKSON vs. THE STATE OF GEORGIA.

There was no abuse of discretion in these cases in refusing to grant a new trial, on the ground that the verdicts were contrary to law and evidence.

Judgment affirmed.

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CONVICTS. See *Torts*, 1, 2.

CORPORATIONS.

1. Judicial cognizance of names of those chartered by legislature. *Jackson, alias Lyles, vs. State*, 28.
2. Charter of railroad, including power to towns on route to subscribe, constitutional. *Hope et al. vs. Mayor; etc., of Gainesville*, 247.
3. Mutual insurance company holding reserve beyond limits of charter or necessities, distribution among contributors compelled in equity. *Carlton et al. vs. So. Mut. Ins. Co. et al.* 371.
4. Stockholder in, or member of, mutual insurance company, who is, as to profits. *Ibid.*
5. Entire change of stockholders not terminate corporation. *Mathis, sh'ff, vs. Morgan*, 517.
6. Presumed to acquire right to cut ditch in manner prescribed by charter. *White vs. Barlow*, 887.
7. Notice to president is notice to company. *Ibid.*

See *Railroads*, 17; *Garnishment*, 3.

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1. Convict in chain-gang whipped, county not liable. *Hammond vs. County of Richmond*, 188.

2. Liability of county, in what class of cases. *Ibid.*

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1. Forgery, immaterial alteration does not constitute. *Jackson, alias Lyles, vs. State*, 28.
2. Forgery, altering figures on margin of order is not. *Ibid.*
3. Name of corporation which does not exist, indictment for forging, fatally defective. *Ibid.*
4. Reasonable fears of one of posse that felony will be committed on officer, justifies killing. *Adams et al. vs. State*, 85.
5. Pilot, proceeding against for dereliction of duty is quasi criminal; commissioners cannot except. *Comm'rs, etc., vs. Tabbutt*, 89.
6. Confessions alone insufficient to convict, but are so if corroborated. *Anderson vs. State*, 98.
7. Confessions, preliminary examination as to in presence of jury, if admitted, not error; *aliter* if rejected. *Ibid.*
8. Re-arrest on failure of party promising to pay prisoner's fine, illegal; discharged under *habeas corpus*. *Williams vs. Mize, sh'ff*, 129.
9. Conviction in county court, after commitment to answer in superior court for same offense, no subsequent arrest. *Ibid.*
10. Recommendation of life imprisonment, discretion of jury not to be limited. *Hill vs. State*, 131.
11. Murder, wilful omission of duty causing death, is. *Lewis vs. State*, 164.
12. Manslaughter, negligent omission of duty causing death, is. *Ibid.*
13. Murder, death from unlawful act tending to kill, is. *Ibid.*
14. Cruel treatment, sayings pending continuance of, not admissible in favor of defendant. *Ibid.*
15. Different offenses of same nature joined in indictment. *Williams vs. State*, 180.
16. Assault with intent to murder and aiming pistol at another joined. *Ibid.*
17. Assault by physician fraudulently exposing female's person, what evidence required to convict. *Nichols vs. State*, 191.
18. Offense not pressed on trial, not pressed in charge. *Ibid.*

19. Lesser offense under indictment, form of verdict as to, properly charged. *Walker vs. State*, 200.
20. Accomplice, boy of twelve years of age coerced, is not. *Beal vs. State*, 200.
21. Accomplice, whether witness is, left to jury. *Ibid.*
22. Statement of prisoner cut off by accident, it should appear who did it. *Dyson vs. State*, 206.
23. Carrying weapons, right to. *Brown vs. State*, 211.
24. Carrying concealed weapons, threats made are no defence. *Ibid.*
25. Conviction in mayor's court for disturbing peace not bar state prosecution for assault and battery. *DeGraffenreid vs. State*, 212.
26. Opprobrious words, state must show want of provocation. *Fuller vs. State*, 213.
27. Assault with intent to murder, facts proved in this case. *Grubb vs. State*, 214.
28. Indecent pictorial newspaper, circulating punished. *Montross vs. State*, 261.
29. Same: Reading matter considered. *Ibid.*
30. Same: Other pictures or papers displayed in same city, no defence. *Ibid.*
31. Prisoner's statement, latitude allowed. *Ibid.*
32. Legal consequences of act intended, presumed. *Ibid.*
33. Test case made, must abide result. *Ibid.*
34. Sentence imposed, no ground for new trial. *Ibid.*
35. Copy of indictment and list of witnesses, right of defendant to have. *Inman vs. State*, 269.
36. Same: Witnesses not on list not excluded. *Ibid.*
37. Array of jurors waived, under facts of case. *Ibid.*
38. Prisoner's evidence at inquest, weight for jury same as other testimony. *Ibid.*
39. Summing up by court in criminal case. *Ibid.*
40. Recommendation to mercy, better practice as to charge on. *Ibid.*
41. Sale of liquor in prohibition city charged, need not alleged to whom. *Hill vs. Mayor, etc., of Dalton*, 314.
42. Sale against ordinance not same as sale without license, under state law. *Ibid.*
43. Municipal corporations, power to try for selling liquor against ordinance. *Ibid.*

44. Bail not relieved by second arrest on another charge and giving bond. *Hartley et al. vs. Colquitt, gov'r*, 351.
45. Attack on person and habitation both in issue, charge on both proper. *Price vs. State*, 441.
46. Trespasser should be warned off before violence used. *Ibid.*
47. Employing servant of another, what sufficient to convict of. *Hightower vs. State*, 482.
48. Accomplice, person present for a time concealing facts is not. *Lowery vs. State*, 649.
49. Accessory, person present and concealing fact is not. *Ibid.*
50. Witness in jail, officer to execute compulsory process should be furnished. *Roberts vs. State*, 673.
51. Reasonable fears, where one brother engaged in difficulty and other comes up. *Johnson vs. State*, 679.
52. Reasonable fears, effect on murder, manslaughter and justifiable homicide. *Ibid.*
53. *Res gestæ*, remark in starting to scene of difficulty. *Ibid.*
54. Dying declarations, charge as to. *Ibid.*
55. Traps to detect and catch thief permissible. *Varner vs. State*, 745.
56. Same: *Animus furandi* not affected by conduct of owner. *Ibid.*
57. Murder, manslaughter and justifiable homicide, correct charge as to. *Cato vs. State*, 747.

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DALTON.

1. Power to prohibit sale of liquor. *Hill vs. Mayor, etc., of Dalton*, 314.

DAMAGES.

1. Attorney's advice as to title wrong, nominal damages recoverable without loss accruing. *Lilly vs. Boyd*, 88.
2. Actual only, when possession of land is taken *bona fide* under mistaken claim. *Scott vs. Mathis*, 119.
3. Turpentine, illegal use of trees for, damages how estimated. *Daniels vs. Edwards & Dukes et al.*, 196.
4. Child injured by negligence, vindictive damages not recovered by father. *Augusta Factory vs. Barnes*, 217.
5. Lease, terms of broken and tenant evicted, measure of damages. *Smith et ux. vs. Eubanks & Hill*, 280.

6. Same: Profits, loss of considered. *Ibid.*
7. Same: Patronage before and after eviction considered how far. *Ibid.*
8. Warrant to dispossess taken out and possession relinquished, actual damages only recovered. *Ibid.*
9. Aggravating circumstances, plaintiff must show, to have \$3066 charged. *W. & A. R. R. vs. Turner*, 292.
10. Discharge or retention of employé committing tort, effect on damages. *Ibid.*
11. Railroad running through street, on suit by owner of abutting property, danger of collisions or fright of animals not considered. *Guess et al. vs. St. Mountain, etc., Co.*, 320.
12. Measure of damages in such case; increased value considered. *Ibid.*
13. Apportionment by jury among trespassers does not apply to personal torts. *McCalla vs. Shaw*, 458.
14. Treble damages for killing cattle, law strictly construed. *Lockett vs. Pittman*, 815.
15. Same: Actual damages, whether recovered under suit for treble damages. *Ibid.*

See *Railroads*.

DEBTOR AND CREDITOR.

1. Wife may be mortgage creditor of husband, and have same rights as other creditors. *Comer & Co. vs. Allen*, 1.
2. Husband's creditor on faith of property in his name superior to wife's claim for money invested. *Kennedy vs. Lee*, 39.
3. Balance carried forward each year, not divided back, so as to give justice court jurisdiction. *Floyd, ex'x, vs. Cox*, 147.
4. Composition brought about by fraud, void. *Saul vs. Buck, Hefflebower & Neer*, 255.
5. Composition at certain rate, paying some creditors more avoids. *Ibid.*
6. Unforeclosed mortgage takes fund in preference to junior judgment, on equitable pleadings. *Baker & Hall vs. Gladden, sheriff*, 469.
7. Deed to secure debt takes fund from sale of property in preference to junior judgment. *Ibid.*
8. Firm assets go first to firm debt and individual assets to individual debt, in case of insolvency. *Keese vs. Coleman & Co.*, 658.

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9. Same: Application of individual assets to individual debt not release firm mortgage. *Ibid.*
 10. Mutual accounts, what are. *Ford vs. Clark, adm'r.* 760.
See *Executions*, 9, 10.

DECATUR. See *Municipal Corporations*, 3.

DECEIT.

1. Warranty waived as such and suit for deceit brought on same. *Peel, trustee, vs. Bryson*, 331.
2. Form of verdict suggested. *Ibid.*

DECREE. See *Judgments*, 11-12.

DEEDS.

1. Number of district in letters and figures different, deed admissible as to land included in numbers. *Way et al. vs. Lowery*, 63.
2. Clerical mistake in record shown by re-cord from another county where part of land lay. *Ibid.*
3. To secure debt takes fund from sale of property, in preference to junior judgment. *Baker & Hall vs. Gladden, sheriff*, 469.
4. To secure debt, with agreement to reconvey on payment, is equitable mortgage. *Wofford vs. Wyllly et al.*, 863.
5. Security deed, with bond to re-convey, purchaser with notice takes subject to equities. *Ibid.*
6. Same: Time of payment left to be determined, sale terminates. *Ibid.*
7. Security deed recovers land in ejectment unless equities set up. *Ibid.*
8. Same: True equity between debtor and creditor. *Ibid.*
9. Mining ditch appurtenant to land, passes under sale of. *White vs. Barlow*, 887.

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DILIGENCE. See *Negotiable Instruments*, 6; *Negligence*.

DISTRESS WARRANT.

1. Past due, debt alleged, but shown not to be, warrant dismissed. *Scott, Horton & Co. vs. Russell*, 35.

2. Claimant may object to process. *Ibid.*
3. Rent not due, no distress warrant, unless tenant removing. *James vs. Benjamin*, 185.
4. County court, when warrant returnable to monthly and when to quarterly session. *Rivers vs Hood*, 194.
5. Partial payment to levying officer extinguishes *pro tanto*. *White vs. Mandeville*, 705.
6. Partial payment made ground of counter-affidavit, tender of balance not necessary. *Ibid.*

DOWER.

1. Superior to mortgage, under facts of case. *Miller, trustee, vs. McDonald et al.*, 20.

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EDUCATION.

1. Glynn county, system of education in. *Board of Education, etc., vs Mayor, etc., of Brunswick et al*, 353.
2. Richmond county, system in. *Smith et al. vs. Bohler et al.*, 546.
3. Tax for school purposes levied, under act "to regulate public instruction." *Ibid.*
4. Tax for school purposes, manner of levy by board of education. *Ibid.*
5. Time of levy of tax in judgment of board. *Ibid.*
6. Excessiveness of school tax must plainly appear, to warrant interference. *Ibid.*
7. *De facto* members of board may act till ejected. *Ibid.*
8. Tax collector's bond covers educational tax. *Ibid.*

EJECTMENT.

1. Title shown out of plaintiff's ancestor defeats him. *Way et al. vs. Lowery*, 63.
2. Clerical error in record of deed shown in ejectment case. *Ibid.*
3. Agreement to make a deed, no recovery on alone. *Heard, ex'r, et al. vs. Palmer, adm'r*, 178.
4. Minor may recover, if title shown, though suit brought by guardian. *Wood et al. vs. Haines*, 189.

5. Possession by ancestor and subsequent possession by heirs makes *prima facie* case. *Ibid.*
6. Guardian's authority to purchase need not be shown in ejectment based on deed to him. *Collins vs. Dixon, gdn.*, 475.
7. Complaint for land plaintiff in, is confined to abstract attached to declaration. *Carter, ex'x, vs. Greer et al.*, 897.
8. Strength of own title, plaintiff must recover on, not on weakness of defendant's. *Ibid.*
9. Assent of executor as link in abstract, must be shown. *Ibid.*

ELECTIONS. See *Quo Warranto*; *Constitutional Law*, 9.

EQUITABLE PLEADINGS. See *Pleadings*, 8.

EQUITY.

1. Contribution compelled from executrix colluding with legatees to make loss fall on co-executor. *Head vs. Bridges et al.*, 30.
2. Decree affirmed by Supreme Court, bill of review not lie to. *Inman, Swann & Co. vs. Foster, trustee, et al.*, 79.
3. Decree for *devastavit* against executors not inconsistent with decree against others to extent to which they aided. *Ibid.*
4. Specific performance of unfair or unjust contract not decreed. *Bagwell vs. Bagwell*, 92.
5. Specific performance is in sound discretion of the court. *Ibid.*
6. Specific performance of agreement to divert individual assets to firm debts not decreed. *Ibid.*
7. Distribute estate in kind and enjoin administrator from selling, equity will. *McCook et al. vs. Pond, adm'r*, 150.
8. Multiplicity of suits, equity abhors. *Geo. Chem., etc., Co. vs. Colquit, et al.*, 172.
9. Motion in arrest of judgment, none in equity. *Hughes et al. vs. Hughes et al.*, 173.
10. Parties, want of proper, question not raised by general demurrer for want of equity. *Ibid.*
11. Equity in bill in this case. *Ibid.*; *Stokes et al. vs. Weems et al.*, 179.
12. Specific performance of voluntary agreement, with possession and improvements. *Hughes et al. vs. Hughes et al.*, 173.
13. Demurrer, bill not dismissed on, before return term. *Murphy vs. Tallulah, etc., Co.*, 196.
14. Specific performance, part performance which authorized. *Hamilton vs. Price*, 214.

15. Open and conclude, under bill to enjoin common law suits, complainant has right to. *Guess et al. vs. St. Mountain, etc, Co.*, 320.
16. Issues of facts must be left to jury, not stopped by non-suit, on conflicting evidence. *Frank vs. Atlanta St. R. R.*, 338.
17. Discovery, leading questions allowed in bill for. *Cade, trustee, vs Hatcher et al.*, 359.
18. Answer of one co-defendant when evidence for another. *Ibid.*
19. Discovery prayed, answer may be used without being offered as evidence by defendant. *Ibid.*
20. Discovery asked, defendant becomes complainant's witness. *Ibid.*
21. Recovery not authorized by pleadings against distributee of estate on his debt, under bill to subject estate in hands of distributees. *Ibid.*
22. Cross-bill claiming distribution of fund germane to bill to fix its status and income. *Carlton et al. vs So. Mut. Ins. Co. et. al.*, 371.
23. Cross-bill may be based on facts arising out of bill or discovered by it. *Ibid.*
24. Mutual insurance company, reserved fund beyond limits of charter or necessities, excess distributed among contributors, in equity. *Ibid.*
25. Classes, policy-holders made parties to bill in, may file cross-bills in. *Ibid.*
26. Policy-holder forced out of mutual insurance company, equity of as to profits. *Ibid.*
27. Same: Demand not necessary before filing cross-bill as to fund before court. *Ibid.*
28. Specific performance of parol gift, what necessary to require. *Poullain et al. vs. Poullain, Sr.*, 412.
29. Demurrer renewed after amendment filed, goes to entire amended bill. *Griffin vs. Augusta & K. R. R.*, 423.
30. Demurrer, notice of not given, not work dismissal of it. *Ibid.*
31. Demurrer admits facts well pleaded; not what is alleged contrary to act of legislature. *Ibid.*
32. Limitations, statute not pleaded by administrator against some, and not others, under bill to marshal assets. *Jordan vs. Brown et al.*, 495.
33. Limitation, relief from bar in equity; and bar for laches. *Ibid.*
34. Distribute estate, bill to, not tried until fund before court, unless by agreement. *Ibid.*

35. Homestead taken from father and put in hands of receiver, strong case required. *Barfield, next friend, vs. Barfield*, 668.
36. Administrator's accounts, jurisdiction over. *Barclay et al. vs. Kimsey et al.*, 725.
37. Chancellor of another circuit passing on injunction without objection, no reversal. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.
38. Remedy at law not as complete, equity grants relief. *Markham vs. Huff*, 874.
39. Landlord foreclosing mortgage in county of tenant's residence, not where premises were, claiming various breaches of covenants, bill by tenant lies. (Jackson, C. J., dissenting.) *Ibid.*
40. Complete relief, equity gives. *Ibid.*
See *Year's Support*, 3; *Injunction*.

ESTATES.

1. Survives to wife, right to estate of deceased ancestor prior to 1866, not reduced to possession by husband. *Sterling, adm'r, vs. Sims*, 51.
2. *Corpus* to be held together till youngest child of age, then equally divided, without regard to prior income, under this will. *Hange, adm'r, vs. Dunlap et al.*, 534.
3. Occupancy free of taxes or repairs, right of, conferred by this will. *Griffin et al. vs. Fleming, ex'r, et al.*, 697.
4. Repairs, advances to executor for, are charges on estate held by him in trust, though during life tenancy. *Ibid.*
5. *Per capita* or *per stirpes*, whether legatees take, under this will. *Huggins et al. vs. Huggins et al.*, 825.
6. Life estate with vested remainder over, under will in this case. *Olmstead vs. Dunn et al.*, 850
7. Life estate and remainder both contingent on death of daughter childless. *Ibid.*
8. *Per capita*, not *per stirpes*, legatees take under this will. *Ibid.*
9. Vested remainders favored in construing will. *Ibid.*

ESTOPPEL.

1. Construction put on lease by one party and acted on with consent of other party, latter estopped from denying. *Daniels vs. Edwards & Dukes et al.*, 196.
2. Grantor or his administrator cannot attack conveyance for grantor's fraud. *Anderson, adm'r, vs. Brown*, 713.

3. Municipal corporation estopped from preventing use of railroad storehouse for fertilizers by seeing built and expenses incurred. *Mayor, etc., of Athens vs. Ga. Railroad*, 800.
4. False and fraudulent representations as to validity of title, acted on to injury, estops from denying. *Roberts vs. Davis*, 819.
5. Same: Representations made after purchase, but which prevented buyer from securing himself on his vendor's warranty, estops. *Ibid.*
6. Tenant cannot dispute landlord's title. *White vs. Barlow*, 887.
See Mortgage, 1; *Arbitration and Award*, 2; *Quo Warranto*, 2; *Fraud*, 2.

EVIDENCE.

1. Illegally admitted, subsequently ruled out, generally cures error; exception under special facts. (Jackson, C. J., dissenting.) *McDonald vs State*, 55; *Powell vs. Watts*, 770.
2. Deed, record of, showing difference between numbers in figures and written, admissible as to land covered by figures. *Way et al. vs. Lowery*, 63.
3. Clerical mistake in record shown by record from another county. *Ibid.*
4. "Value received," explained, and failure of consideration shown by parol; *aliter*, if consideration is stated. *Pitts vs. Allen*, 69.
5. Inaccessible, witness in criminal case being, testimony on committing trial shown by parol. *Smith vs State*, 114.
6. Newly discovered testimony, merely cumulative, not cause new trial. *Ibid.*; *Dyson vs. State*, 206. (See No. 27 below.)
7. Sayings and acts of owner of land fixing boundaries, admissible; *aliter*, after parting with title. *Marion vs. Hoyt et al.*, 117.
8. Returns of guardian not appointed at term of court of ordinary, not admissible as true. *Bell vs. Love*, 125.
9. Sayings pending cruel treatment not admissible on behalf of defendant making them. *Lewis vs State*, 164.
10. Sayings of father and his widow admissible on question of gift to son. *Hughes et al. vs. Hughes et al.*, 173.
11. *Res gestæ*, facts forming part of, admissible. *Williams vs. State*, 180.
12. "On or before" in note not explained by parol. *James vs. Benjamin*, 185.

13. Admitted without objection, no ground for new trial. *Walker vs. State*, 200.
14. Character of witness to will, when admissible to show. *Moseley vs. Evans et al.*, 203.
15. Sayings of prosecutor admissible only to impeach him. *Womack vs. State*, 215.
16. Child injured, emancipation from parent sought to be shown, accounting to father for wages admissible. *Augusta Factory vs. Barnes*, 217.
17. *Res gestæ*, sayings of injured child shortly after injury. *Ibid.*
18. Competency doubtful, goes to jury. *Ibid.*
19. Sayings of one doctor to another as to cause of death inadmissible. *Ibid.*
20. Amount of damage, witness cannot state in round numbers. *Smith et ux. vs. Eubanks & Hill*, 280.
21. Profits shown in estimating damages for breaking lease of wagon-yard. *Ibid.*
22. Patronage of yard after eviction shown for what purpose. *Ibid.*
23. *Res gestæ*, statement of husband in procuring comrade to go with him to see wife, on which trip he was killed. *Price vs. State*, 441.
24. Wife in improper situation with another than husband shown, where difficulty arose out of domestic troubles. *Ibid.*
25. General good character shown to rebut impeachment by contradictory sayings. *Ibid.*
26. Original record, admitted to be so, admissible. *Rogers vs. Tillman*, 479.
27. Newly discovered, new trial granted on. *Colquitt, gov'r, vs. Smiths*, 515. (See No. 6 above.)
28. Same: Affidavit of want of knowledge by attorney. *Ibid.*
29. Admissions, weight of. *Smith vs. Page, adm'r, et al.*, 539.
30. Sayings as to disposition of property admissible as disclaimer. *Ibid.*
31. Sayings admissible to sustain witnesses in this case. *Ibid.*
32. Administrator's returns made out, but not received or approved, used as admissions, but not for him. *Dowling vs. Feeley et al.*, 557.
33. Same: Returns, inchoate, on separate sheets, part used as admissions, without tendering all. *Ibid.*
34. Admission shown, right to put in all connected with. *Ibid.*
35. Value of board shown by any one familiar with. *Ibid.*
36. Ambiguities in numbering and paging of will explained by parol. *Burge et al. vs. Hamilton et al., ex'rs*, 568.

37. Will, papers which constitute shown by parol. *Ibid.*
38. Sayings of testator admissible to identify paper propounded as his will. *Ibid.*
39. Same: Also on question of *revocavit vel non*. *Ibid.*
40. Latitude, greater allowed on probate than in construction of will. *Ibid.*
41. Parol not admitted to alter written contract, but may show circumstances and consideration. *Anderson, adm'r, vs. Brown*, 713.
42. Insurance policy not admitted as admission of insured as to title. *Ibid.*
43. Administrator suing for lands conveyed by intestate, outstanding liabilities admitted, details irrelevant. *Ibid.*
44. Capacity of grantor in issue, trade between him and witness shown on cross-examination. *Ibid.*
45. Withdraw interrogatories, party may before they go to jury; oral question and answer not withdrawn. *Ibid.*
46. Admissions of claimant to plaintiff admissible, though involving conversations with deceased defendant. *Powell vs Watts*, 770.
47. Admissions of defendant while in possession admissible, when. *Ibid.*
48. Motive, party may testify to. *Ibid.*
49. Verdicts in other claim cases not admissible. *Ibid.*
50. "Working boss" saying he had orders to kill people coming on place irrelevant in action for killing cow. *Lockett vs. Pittman*, 815.

See *Witness; Practice in Superior Court*, 3.

EXECUTIONS.

1. Against sheriff, how directed. *Blanco & McGarough vs. Mize*, 96.
2. Surety or endorser paying, gives right to control, though without entry. *Thomason, ass'ee, vs. Wade et al.*, 160.
3. Entry made by plaintiff's attorney, pending claim case. *Ibid.*
4. Amended, levy falls. *Artope et al. vs. Barker*, 186.
5. *Alias fi. fa.* amended to conform to original, levy made under original does not fall. *Ibid.*
6. Recital in *fi. fa.* issued by governor on bond of state depository *prima facie* correct. *Colquitt, gov'r, vs. Simpson & Ledbetter*, 501.
7. Partial payment to levying officer extinguishes *pro tanto*. *White vs. Mandeville*, 705.

8. Partial payment made ground of illegality, balance admitted must be tendered. *Ibid.*
9. Claim case compromised, *fi. fa.* subjecting has lien on fund. *Sims et al. vs. Albea, sheriff, et al.*, 751.
10. Same: Other *fi. fas.* take nothing by compromise, but remanded to property. *Ibid.*

FERTILIZERS.

1. *Kleckley vs. Leyden*, 63 Ga., 215, approved. *Leman vs. Saunders et al.*, 202.
2. Storehouse for in city, right of railroad to use, when. *Mayor, etc., of Athens vs. Ga. R. R.*, 800.

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FRAUD.

1. Husband reviving debt to wife barred by statute not fraud *per se*, but may be considered. *Comer & Co. vs. Allen*, 1.
2. Two innocent persons, one putting it in power of third party to commit fraud, must suffer. *Kennedy vs. Lee*, 39; *Mathis, sheriff, vs. Morgan*, 517.
3. Composition with creditors avoided by fraud. *Saul vs. Buck, Hefflebower & Neer*, 254.
4. Avoid sale, fraud which is sufficient to. *Johnson et al. vs. Dooly et al.*, 297.
5. Bankruptcy, what fraud prevents discharge of debt in. *Peel, trustee, vs. Bryson*, 331.
6. Fraudulent character not changed by being reduced to judgment. *Ibid.*
7. Sheriff's sale set aside for. *Parker, adm'r, vs. Glenn et al.*, 637.
8. Price grossly inadequate is badge of fraud. *Ibid.*
9. Of grantor not set up by him or his administrator. *Anderson, adm'r, vs. Brown*, 713.

See *Husband and Wife*, 13-14; *Estoppel*, 4, 5.

GAINESVILLE. See *Constitutional Law*, 1-3.

GARNISHMENT.

1. Consolidated, two cases only by consent; separate writs of error proper. *Pupke, Reid & Phelps vs. Meador; Smith & Bondurant vs. Meador*, 230.

2. Funds raised from goods, etc., of defendant shown, burden on garnishee to show not subject. *Ibid.*
3. Salary of officer of corporation over \$500.00 a year, subject. *Bailie & Bro. vs. Mosher et al.*, 740.

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GEORGIA RAILROAD. See *Municipal Corporations*, 10.

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GLYNN COUNTY.

1. Power of board of education over funds from endowment of Glynn County Academy. *Board of Education, etc., vs. Mayor, etc., of Brunswick et al.*, 353.

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GUANO. See *Fertilizers*.

GUARDIAN AND WARD.

1. Letters granted out of regular term of court of ordinary void. *Bell vs. Love*, 125.
2. Returns of guardian appointed out of term not admissible. *Ibid.*
3. *De facto* guardian, none in this state. *Ibid.*
4. Ejectment by guardian, recovery by ward on proof of title. *Wood et al. vs. Haines*, 189.
5. Dismissal, judgment of bars as to matters covered by it. *Poullain et al. vs. Poullain, Sr.*, 412.
6. Re-open settlement in four years, right applies to settlement not before ordinary. *Ibid.*
7. Authority to buy need not be shown to recover under deed to him. *Collins vs. Dixon, gd'n*, 475.
8. Profits on funds, guardian may not make. *Dowling vs. Feeley et al.*, 557.
9. Losses of venture with funds fall on guardian. *Ibid.*
10. Expenses not to exceed income, unless by ordinary's approval *Ibid.*
11. Returns regular and approved ratifies expenditures. *Semble. Ibid.*
12. Guardian *ad litem*, administratrix who was party to suit, ap-

pointed and not refusing, no other order necessary. *Barclay et al. vs. Kimsey et al.*, 725.

See *Administrators and Executors*, 16-21.

HABEAS CORPUS. See *Criminal Law*, 8.

HIRING. See *Contracts*, 2-3.

HOMESTEAD.

1. Purchase money, note for purchase from one without title not binding as, after surrender and subsequent purchase from one with title. *Farmer vs. Word*, 16.
2. Application, what necessary in, under act of 1868. *Hardin vs. McCord, ex'r*, 239.
3. Amended after grant, application may be, so as to show residence and head of family. *Ibid.*
4. Service of creditors named, presumed from approval of application. *Chalker vs. Thompson et al.*, 478.
5. Exemption after giving forthcoming bond, but before sale, relieves bond. *Ibid.*
6. Receiver not appointed as against head of family, except in strong case. *Barfield, next friend, vs. Barfield*, 668.
7. Injunction not granted to prevent head of family from applying for leave to sell. *Ibid.*
8. Second wife shares benefits of existing homestead. *Ibid.*

See *Bankruptcy*, 4.

HOMICIDE. See *Husband and Wife*, 9, 10; *Murder*; *Manslaughter*.

HUSBAND AND WIFE.

1. Separate property, power of wife as to. *Comer & Co. vs. Allen*, 1.
2. Creditor of husband, wife has equal rights with others, if without fraud. *Ibid.*
3. Act of 1866, marriage before, but property reduced to possession after, as wife's, she is creditor, and may take mortgage. *Ibid.* (See No. 7 below.)
4. Debt barred by statute of limitations, reviving is not fraud *per se*, but may be considered. *Ibid.*
5. Wife's equity inferior to that of creditor on faith of property allowed to stand in husband's name. *Kennedy vs. Lee*, 39.
6. Dealings between husband and wife scanned closely. *Ibid.*
7. Survives to wife, interest in realty of deceased ancestor prior

to 1886 not reduced to possession in lifetime of husband.
Sterling, adm'r, vs. Sims, 51. (See No. 3 above.)

8. Realty and personalty on same plane as to marital rights. *Ibid.*
9. Homicide of husband, wife's right of action for, and what defences proper to. *Berry vs. N. E. Railroad*, 137.
10. Same: Want of ordinary care in husband falling into railroad cut, defeats recovery. *Ibid.*
11. Voluntary delivery by husband to wife, of bond for title, not carry right to do as he pleased with it. *Klink vs. Boland*, 485.
12. Separate property of wife conveyed to secure husband's debt, ratification by wife not make valid; nor consent for creditor to sell to another. *Ibid.*
13. Separate property conveyed by wife, true facts being concealed from her, creditor must not only be ignorant of concealment, but must not have reasonable ground of suspicion. *Ibid.*
14. Collusion between husband and creditor shown in this case. (Hammond, J., *dubitante*). *Ibid.*
15. Kindred are the same, as to affection, in making will. *Burge et al. vs. Hamilton et al., ex'rs*, 568.
16. Homestead, second wife shares benefits of. *Barfield, next friend, vs. Barfield*, 668.
17. Creditor after record of voluntary conveyance to wife, cannot subject. *Sims et al. vs. Albea, sheriff, et al.*, 751.
18. Voluntary settlement not recorded in three months, not good against creditor before record. *Ibid.*
19. Administration of wife abating on marriage, husband preferred as successor. *Long et al. vs. Huggins et al.*, 776.

See *Year's Support*, 2.

ILLEGALITY.

1. Dismissed, direct exception, not motion for new trial, proper. *Artope et al. vs. Barker*, 186.
2. Defendants in *fi. fa.* only can file. *Ibid.*

INDICTMENT. See *Criminal Law*, 3, 12, 13.

INDORSEMENT.

1. Acceptance negotiated, maker stands as first indorser. *Par-melee vs. Williams*, 42.
 See *Principal and Surety*.

INFANCY.

1. Support of minor child of decedent, guardian, not administrator, liable. *Pryor vs. West, adm'r*, 140.

2. Minor may recover, if title shown in him, though suit in name of guardian. *Wood et al. vs. Haines*, 189.
3. Diligence toward minor employé, more necessary than towards adult. *Augusta Factory vs. Barnes*, 217.

INJUNCTION.

1. Proper parties made, injunction without, error. *Miller, trustee, vs. McDonald et al.*, 20.
2. Discretion allowed where facts involved; *aliter*, where point is on jurisdiction. *Head vs. Bridges et al.*, 30; *Daniels vs. Edwards & Dukes et al.*, 196.
3. Mortgage proceeding against goods not covered, enjoined. *Lanier vs. Adams, Thorne & Co.*, 145.
4. Administrator's sale enjoined where unnecessary and the estate ripe for distribution. *McCook et al. vs. Pond, adm'r*, 150.
5. Executor's sale not enjoined by creditors by account, though executrix insolvent. *Elam, ex'x, vs. Elam et al.*, 162.
6. Bare fear of loss not require injunction. *Ibid.*
7. Twelve months' exemption of executrix from suit, no ground of injunction against sale. *Ibid.*
8. Contest over claims against estate no ground of injunction against sale of property. *Ibid.*
9. Public nuisance causing special continuing damages to individual, enjoined. *Georgia Chem., etc., Co. vs. Colquitt et al.*, 172.
10. Facts not warranting. *Masland, Jr., vs. Kemp et al.*, 182.
11. Turpentine, illegal use of trees for, by solvent person, no injunction. *Daniels vs. Edwards & Dukes et al.*, 196.
12. Tenant holding over, remedy at law complete. *Ibid.*
13. Mill-dam, increasing height so as to produce sickness, enjoined. *Minor vs. De Vaughn*, 208.
14. Judgment through negligence in making defence, not enjoined. *Neal vs. Henderson*, 209.
15. Illegality on ground of payment decided for plaintiff, injunction refused. *Ibid.*
16. Homestead, application for leave to sell not enjoined. *Barfield, next friend, vs. Barfield*, 668.
17. Chancellor of other circuit presiding, objection to authority when made. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.
18. Trespass, when enjoined. *Ibid.*
19. Title and possession, conflicting claims as to, injunction proper. *Ibid.*

See *Practice in Supreme Court*, 17; *Jurisdiction*, 5.

INSOLVENCY. See *Partnership*, 6-7.

INSURANCE.

1. Reserved fund of mutual company larger than charter or necessities require, excess divided in equity among contributors. *Carlton et al. vs. So. Mut. Ins. Co. et al.*, 371.
2. Classes, policy-holders made parties in, may file cross-bills in. *Ibid.*
3. Mutual insurance, basis of and rights as to profits and losses discussed. *Ibid.*
4. Southern Mutual Insurance Company, mutuality, membership-rights as to profits, and limits of reserved fund. *Ibid.*
5. Books, resolutions and publications as to reserve, effect of. *Ibid.*
6. Premium notes and cash premiums discussed. *Ibid.*
7. Forced out of mutual company, equity of policy-holders. *Ibid.*
8. Limitations, statute does not run against claim of contributor to mutual company until knowledge of accessible fund. *Ibid.*
9. Demand not necessary before asserting right to fund by cross-bill, when brought in by bill. *Ibid.*
See *Evidence*, 42.

INTEREST AND USURY.

1. Partner advancing to firm, interest not run unless by agreement. *Prentice vs. Elliott*, 154.
2. Judgment bears same rate as contract on which founded. *Daniel vs. Gibson*, 367.
3. Collateral security, collection to extent of principal and legal interest not prevented by usury in main debt. *Partridge vs. Williams' Sons*, 807.
4. Contract for interest, which must be in writing under act of 1875, not necessary to be signed by debtor, if held by him *Wofford vs. Wyly et al.*, 863.
5. Interest on interest not favored. *Ibid.*
6. Compounding improper under facts of case. *Ibid.*

INTERROGATORIES. See *Practice in Supreme Court*, 31; *Evidence*, 45.

JUDGE.

1. Language in rendering decision, not subject of exception. *Smith et al. vs. Bohler et al.*, 546.

JUDGMENTS.

1. In justice's court void, if no summons. *Jeffers et al. vs. Ware*, 135.
2. Same: Judgment on bond to dissolve garnishment set aside, if no summons in original suit. *Ibid.*
3. By default, not set aside on *ex parte* statement of parol agreement of counsel. *Exchange B'k vs. Elkan*, 197.
4. Motion to set aside, notice necessary. *Ibid.*
5. Enjoined, judgment not, if *laches* in defending. *Neel vs. Henderson*, 209.
6. Interest on at same rate as borne by contract on which founded. *Daniel vs. Gibson*, 367.
7. Notice of judgment not alone prevent *bona fides* of purchaser holding four years. *Sluder vs. Bartlett*, 463.
8. Letters of administration, grant not collaterally attacked for irregularities. *Barclay et al. vs. Kimsey et al.*, 725.
9. Same: Especially after having stood for years, and after important rights have vested under them. *Ibid.*
10. Against administrator binds all distributees. *Ibid.*
11. Irregularities, slow to upturn decree for, after eleven years, and rights vested under. *Ibid.*
12. Irregularities not avoid decree, as to persons acquiring rights *bona fide*. *Ibid.*

See *New Trial*, 7; *Partition*, 1.

JUDICIAL COGNIZANCE.

1. Names of corporations chartered by legislature, courts take cognizance of. *Jackson, alias Lyles, vs. State*, 28.

JURISDICTION.

1. Contribution from co-executrix colluding with heirs, bill to enforce and for injunction, proper in county of residence, though proceeding by legatees to call executors to account was elsewhere. *Head vs. Bridges et al.*, 30.
2. Yearly balance of accounts carried forward, not divided so as to give justice court jurisdiction. *Floyd, ex'x, vs. Cox*, 147.
3. Railroad carrying goods by wrong route, with notice, and refusing to deliver without payment of freight, jurisdiction in county of demand. *Bird vs. Ga. R. R.*, 655.
4. Chancellor of another circuit, authority to preside on hearing of injunction, objection when made. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.

5. Enjoin other suits, and settle whole matter in county where landlord forecloses mortgages for breach of covenant, equity may. (Jackson, C. J., dissenting.) *Markham vs. Huff*, 875.
6. Summons, no jurisdiction in justice's court without. *Jeffers et al. vs. Ware*, 135.

JURY AND JURORS.

1. Great-granddaughter of common ancestor is related within fourth degree to another great-granddaughter; but their husbands are not. *McKinney vs. McKinney*, 80.
2. Injury, none resulting from disqualified juror's sitting, new trial not granted. *Ibid.*
3. Grand jurors qualified when drawn may serve, though left out on revision of box before empanelled. *Williams vs. State*, 180.
4. Impeach finding, jurors cannot. *Dyson vs. State*, 206.
5. Facts should be left to jury. *Frank vs. Atlanta Street Railroad*, 338.
6. Attacked, may repel by counter-affidavit. *Price vs. State*, 441.
7. Paper going out with jury, but not read, not require new trial. *Schmertz & Co. vs. Johnson*, 472.
8. Grand jury, jury stricken from in discretion of court. *Burge et al. vs. Hamilton et al., ex'rs*, 568.
9. Bailiff in charge of jury not sworn, new trial. *Roberts vs. State*, 673.
10. Initials of given name on list furnished, but written in full in jury list, not cause for challenge. *Cato vs. State*, 747.
11. Impartial, juror answered that he could not say he was, but then answered that he was, competent. *Ibid.*
12. Prior, decision of court as, not reviewed. *Ibid.*
See *Constitutional Law*, 5, 9.

JUSTICES AND JUSTICE COURTS.

1. Summons necessary to jurisdiction; judgment without is void. *Jeffers et al. vs. Ware*, 135.
2. Same: Judgment on garnishment bond, with no summons in original suit, set aside on motion. *Ibid.*
3. Sale to save expense, what order sufficient. *Wilson vs. Garrick et al.*, 660.
4. Pleadings, strictness in not required. *Ibid.*
5. Continuance only from term to term. *White vs. Mandeville*, 705.

6. Postponement of case from one day to another, illegal. *Ibid.*
7. Same: Consent not make judgment void. *Ibid.*
8. Terms may last more than one day, if fixed in advance. *Ibid.*
See *Jurisdiction*, 2; *Appeal*, 1; *Certiorari*.

JUSTIFICATION. See *Pleadings*, 4.

LABORERS. See *Liens*, 9-11.

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LANDLORD AND TENANT.

1. Tenant cannot deny landlord's title or attorn to another.
Clarke et al. vs. Beck, 127. (See No. 6 below.)
2. Attornment to another not affect landlord. *Ibid.*
3. Tenant holding over, remedy at law complete. *Daniels vs. Edwards & Dukes et al.*, 196.
4. Lien for supplies, what necessary to allege in affidavit to foreclose. *Ware vs. Blalock et al., adm'rs*, 804.
5. Equity has jurisdiction where landlord goes outside of usual remedies and forecloses mortgage in county of residence of tenant, not same as that of rented premises. (Jackson, C. J., dissenting.) *Markham vs. Huff*, 874.
6. Estopped from disputing landlord's title, tenant is. *White vs. Barlow*, 887. (See No. 1 above.)
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LAWS.

1. Concurrent acts before legislature, how construed together.
Hope et al. vs. Mayor, etc., of Gainesville, 246.
2. Omission of act from Code, not repeal. *Bailie & Bro. vs. Mosher et al.*, 740.
3. Treble damages for killing cattle, strictly construed. *Lockett vs. Pittman*, 815.
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LEVY AND SALE.

1. Immature crops not subject, unless debtor absconds or removes.
Scott, Horton & Co. vs. Russell, 35.

2. Coroner levying *fi. fa.* against sheriff, authority should appear how. *Blance & McGarough vs. Mize*, 96.
3. Overplus from tax sale of unreturned property, how disposed of. *Summers, ord'y, vs. Christian et al.*, 193.
4. Advertisement of marshal's tax sale in Sunday paper, illegal. *Sawyer vs. Cargile*, 290.
5. Set aside sale under *fi. fa.*, power of court issuing to. *Johnson et al. vs. Dooly et al.*, 297. (See No. 11 below.)
6. Entry of levy on seven hundred acres of land, without more, void. *Collins vs. Dixon, gdn.*, 475.
7. Exemption granted after giving forthcoming bond but before sale, relieves bond. *Chalker vs. Thompson et al.*, 478.
8. Price, inadequacy alone not set aside; but with other circumstances making fraud may do so. *Parker, adm'r, vs. Glenn et al.*, 637.
9. Price grossly inadequate, badge of fraud. *Ibid.*
10. Irregularities not affect title of innocent purchaser; *aliter* of one put on inquiry. *Ibid.*
11. Set aside sale, power of court to. *Ibid.* (See No. 5 above.)
12. Amount not raised greater than that in execution. *Ibid.*
13. Subdivision of land, power and duty of sheriff as to. *Ibid.*
14. Notice of defect in title, what insufficient. *Wilson vs. Garrick et al.*, 660.
15. Property claimed, sold to save expense, what order in justice court sufficient. *Ibid.*
16. Mining ditch and water passes under sale of land on which situated. *White vs. Barlow*, 887.

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LIBEL.

1. Privilege and its abuse is for jury. *Pearce vs. Brower*, 243.
2. Malice presumed and rebutted how. *Ibid.*
3. Malice, want of, mitigates where no privilege, and bars where privileged communication. *Ibid.*

LIENS.

1. Carpenter building house under contract is both contractor and mechanic. *Thurman, adm'r, vs. Pettitt*, 38.
2. Notice to owner of land necessary to lien for materials furnished to contractor. *Gross, bishop, vs. Butler*, 187.
3. Notice to priest insufficient, title being in bishop. *Ibid.*

4. Code, §1979, requirements of must be strictly followed. *Ibid.*
5. Demand on present owner of saw-mill necessary; on former owner when logs furnished, insufficient. *Aiken vs. Peck & Allen et al.*, 434.
6. Compromise in claim case, *fi. fa.* subjecting has lien on fund. *Sims et al. vs. Albea, sheriff, et al.*, 751.
7. Same: Other *fi. fas.* take no benefit from compromise. *Ibid.*
8. Same: Other *fi. fas.* remanded to property. *Ibid.*
9. Laborer's lien must be foreclosed, to claim money in court, though labor done prior to foreclosure of contesting mortgage. *Cumming vs. Wright et al.*, 767.
10. Foreclosure claiming money bad, new foreclosure not allowed to take fund. *Ibid.*
11. Defective process amendable; affidavit not. *Ibid.*
12. Landlord's lien for supplies, affidavit to foreclose, what sufficient. *Ware vs. Blalock et al., adm'rs*, 804.
13. Same: Property to which lien attaches need not be alleged; law fixes. *Ibid.*
14. Attorneys have lien for fees on land recovered for client. *Wilson vs. Wright, survivor*, 848.
- 15 Attorneys' lien pending bill to enforce, purchaser takes subject to. *Ibid.*

See *Railroads*, 6-7.

LIMITATIONS, STATUTE OF.

1. Husband may revive debt to wife, by written acknowledgment. *Comer & Co. vs. Allen*, 1.
2. Memorandum unsigned and found after death of maker, not relieve bar. *Abercrombie et al. vs. Butts, adm'r, et al.*, 74.
3. Barred, action was in this case. *Ibid.*
4. Attorney wrongly reporting title good, statute runs from date of advice. *Lilly vs. Boyd*, 83.
5. Partners, claims between, bar does not run until firm affairs settled. *Prentice vs. Elliott*, 154.
6. Notes barred in this case; charge correct. *Cutliff vs. Boyd et al.*, 302.
7. Act of 1869 must be pleaded. *Peel, trustee, vs. Bryson*, 331.
8. Mutual insurer, statute does not run against demand for division of excessive reserve, until knowledge of accessible fund. *Carlton et al. vs. Southern Mutual Insurance Co. et al.*, 371.
9. Minority prevents bar. *Poullain et al. vs. Poullain, Sr.*, 412.
10. Fiduciary relation which prevents bar. *Ibid.*

11. Four years' possession of land relieves from judgment, though purchaser had notice thereof. *Sluder vs. Bartlett*, 463.
12. Administrator cannot relieve as to some and not others, under bill to marshal assets. *Jordan vs. Brown et al.*, 495.
13. Relieve bar, equity may, on proper facts. *Ibid*; *Griffin et al. vs. Fleming, ex'r, et al.*, 697.
14. Equity may bar for *laches*. *Jordan vs. Brown et al.*, 495.
15. Firm debt not relieved of bar by individual promise. *Ford vs. Clark, adm'r*, 760.
16. Mutual accounts not barred till last item barred. *Ibid*.
17. Payments on account do not make mutual. *Ibid*.

LIQUOR. See *Criminal Law*, 41-43.

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MALICIOUS PROSECUTION.

1. What necessary to prove, in order to recover. *Rogers vs. Tillman*, 479.

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MASTER AND SERVANT.

1. Railroad, employé on, injured, no negligence shown, non-suit granted. *Stanley vs. Richmond, etc., Extension Co.*, 202.
2. Employé injured by other servant disconnected from him, may recover. *Augusta Factory vs. Barnes*, 217.
3. Orders of superior, effect on recovery by injured employé. *Ibid*.
4. Minor employé, duty of master towards. *Ibid*.
5. Torts of servant, wilful or negligent, railroad liable for. *W. & A. R. R. vs. Turner*, 292.
6. Discharge or retention of servant committing tort, effect on damages recovered. *Ibid*.
7. Employing servant of another criminal. *Hightower vs. State*, 482.
8. Same: Contract must be written and attested, but need not be signed by both parties. *Ibid*.

9. Wilful trespass of servant, master liable for when. *Lockett vs. Pittman*, 815.

MASTER IN CHANCERY. See *Auditors*.

MECHANICS. See *Liens*, 1.

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MORTGAGE.

1. Junior mortgage reciting senior, and given with notice, is holder precluded from denying? *Quære?* *Comer & Co. vs. Allen*, 1.
2. Power of sale revoked by death of mortgagor. *Miller, trustee, vs. McDonald et al.*, 20.
3. Enjoined from proceeding against goods not covered. *Lanier vs. Adams, Thorne & Co.*, 145.
4. Unforeclosed, cannot claim fund from sale of property under judgment; *aliter*, in equity, or on rule, with equitable pleadings. *Baker & Hall vs. Gladden, sheriff*, 469.
5. Same: Unforeclosed mortgage takes precedence of junior judgment. *Ibid.*
6. Labor done before foreclosure of mortgage, foreclosure of lien claiming fund improper, new foreclosure not allowed to take fund. *Cumming vs. Wright et al.*, 767.
7. Equitable owners may mortgage their shares. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.
8. Sale of mortgaged property under *fi. fa.* only carries equity of redemption. *Ibid.*
9. Foreclosure of chattel mortgage, substantial compliance with statute necessary. *Duke vs. Culpepper*, 842.
10. Foreclosure against E. C., alleging C. to be agent, bad, where mortgage was signed by C. as trustee. *Ibid.*
11. Same: Not amended by alleging that C. should have signed as agent and was never in fact trustee. *Ibid.*
12. Equitable mortgage, deed with bond to re-convey, is. *Wofford vs. Wyly et al.*, 863.

13. Same: Paper relied on to change deed to equitable mortgage, not attacked. *Ibid.*
14. Enter and work out debt, mortgagee not allowed to. *Ibid.*

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MUNICIPAL CORPORATIONS.

1. Tort on one convict by another, or by guard, city not liable. *Doster vs. City of Atlanta*, 233.
2. Liquor sold in city against ordinance, power to try in mayor's court, without jury. *Hill vs. Mayor, etc., of Dalton*, 314.
3. Railroad run through street, power of council of Stone Mountain to allow. *Guess et al. vs. St. Mountain, etc., Co.*, 320.
4. Slight elevations or depressions in streets, suits for, discouraged. *Bellamy vs. City of Atlanta*, 420.
5. Destroy building in center of block, can city, under power over unsafe buildings on streets, lanes and alleys? *Frank vs. City of Atlanta*, 428.
6. Powers, cities have only those expressly given or necessarily implied. *Ibid.*
7. Destroy private property for public good, law authorizing must be strictly followed. *Ibid.*
8. Railroad store-house not included in ordinance against storing fertilizers. *Mayor, etc., of Athens vs. Ga. R. R.*, 800.
9. Estoppel by seeing store-house erected without objection. *Ibid.*
10. Georgia Railroad, right to use store-house for fertilizers in city of Athens. *Ibid.*

See *Streets and Sidewalks*; *Tax*, 2; *Criminal Law*, 25; *Quo Warranto*, 2.

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NEGLIGENCE.

1. Criminal negligence of railroad, contract not to sue for, void. *Cook vs. W. & A. R. R.*, 48.
2. Criminal negligence defined. *Ibid.*
3. Is question for jury. *Sav., Fla. & W. Rwy. vs. Stewart*, 207.

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NEGOTIABLE INSTRUMENTS.

1. Time for payment not specified in draft, due on presentation. *Roswell Mfg. Co. vs. Hudson, Watson & Co.*, 24.
2. *Bona fide* holder, taker of negotiable draft before presentation is, time when due not being specified. *Ibid.*
3. *Bona fide* holder protected against second draft obtained and paid through fraud of payee. *Ibid.*
4. Duplicate or second, what is not, in commercial law. *Ibid.*
5. Notice, any circumstance putting on guard against paper is. *Ibid.*
6. Diligence of holder, depends on facts of each case. *Ibid.*
7. Acceptor primarily liable as maker, drawer stands as first endorser. *Parmelee vs. Williams*, 42.
8. Indulgence granted to acceptors with higher interest, and they becoming insolvent, security discharged. *Ibid.*
9. Acceptor with cotton of drawer in hand, is not accommodation acceptor. *Ibid.*
10. Collateral security, holder of paper as, before due, and without notice, takes free from equities between parties. *Partridge vs. Williams' Sons*, 807.
11. Collateral renewed at same interest, not make subject to equities. *Ibid.*
12. Usury in main debt not prevent collection of collateral to extent of principal and legal interest. *Ibid.*

See *Promissory Notes*.

NEW TRIAL.

1. Discretion exhausted by first grant. *Cook vs. W. & A. R. R.*, 48.
2. Non-suit held improper, finding of jury for plaintiff not set aside. *Ibid.*
3. Affidavits used on hearing must be authenticated by judge, or grounds dependent on disregarded. *McDonald vs. State*, 55.
4. Newly discovered evidence, merely cumulative, will not require new trial. *Smith vs. State*, 114.
5. Grant right, but on wrong grounds, in this case. *Scott vs. Mathis*, 119.
6. Continued to next term, motion then completed by filing brief of evidence. *Navel et al. vs. Grannis et al.*, 204.
7. Consent for decision in thirty days, time is of essence of contract; decision afterwards void. *Patterson et al., comm'rs, vs. Hendrix et al.*, 204.

8. Discretion in granting not abused. *Hazzard vs. Mayor, etc., of Savannah*, 205; *West vs. A. & W. P. R. R.*, 208; *King vs. American, etc., Co.*, 210; *Hamilton vs. Price*, 214; *City of Atlanta vs. Bellamy*, 420; *O'Brien et al. vs. White*, 900.
9. Statement of prisoner accidentally prevented, motion should show by whom prevented. *Dyson vs. State*, 206.
10. Discretion in refusing not abused. *Sav., Fla. & W. Rwy. vs. Stewart*, 207; *McDonald vs. State*, 211; *Central R. R. vs. Gleason & Harmon* 742; *Liddell, adm'r, vs. Wright, adm'r*, 899; *James vs. State*; *Jackson vs. State*, 901.
11. Presumption that errors will be corrected on new trial. *Hamilton vs. Price*, 214.
12. Sentence imposed, no ground for new trial. *Montross vs. State*, 261.
13. Granted to one joint defendant in case for personal tort, should be granted to other also. *McCalla vs. Shaw*, 458.
14. All errors should be set out in. *Lowery vs. State*, 649.

NON-SUIT.

1. Employé on railroad injured, no negligence shown, non-suit proper. *Stanley vs. Richmond, etc., Extension Co.*, 202.
2. Properly refused in this case. *Augusta Factory vs. Barnes*, 218.
3. Not granted because judge would grant new trial after verdict, evidence being conflicting. *Frank vs. Atlanta St. R. R.*, 338; *Frank vs. City of Atlanta*, 428.
4. Motion to dismiss bill under evidence is analogous to motion for non-suit. *Ibid.*
5. Exception to grant directly taken, or motion to re-instate, and exception to refusal. *Aiken vs. Peck & Allen et al.*, 434.
6. Barred, account appearing to be, non-suit proper. *Ford vs. Clark, adm'r*, 760.

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1. To purchaser of negotiable paper, what amounts to. *Roswell Mfg. Co. vs. Hudson, Watson & Co.*, 24.
2. Of lien for materials furnished contractor, to whom given. *Gross, bishop, vs. Butler*, 187.
3. Of motion to set aside judgment necessary. *Exchange B'k vs. Elkan*, 197.
4. Actual, what sufficient to give. *Johnson et al. vs. Dooly et al.*, 297.
5. Of demurrer to bill not given, not cause dismissal of same. *Griffin vs. Augusta & K. R. R.*, 423.

6. Of road commissioners' court, what sufficient. *Sims et al. vs. Hutcheson et al., comm'rs*, 437.
7. To work roads, what sufficient. *Ibid.*
8. To creditor named in application for homestead before approval presumed. *Chalker vs. Thompson et al.*, 478.
9. Knowledge that bank is state depository, puts on inquiry whether president is security on bond. *Colquitt, gov'r, vs. Simpson & Ledbetter*, 501.
10. Marks on goods considered on question of notice of route by which to be sent. *Bird vs. Ga. R. R.*, 655.
11. "First-class law-suit," and bad title, that purchaser is buying, not notice of defect. *Wilson vs. Garrick et al.*, 660.
12. Of order for sale to save expense of keeping property, what sufficient in justice's court. *Ibid.*
13. *Lis pendens* to enforce lien on land is notice to purchaser. *Wilson vs. Wright, survivor*, 848.
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NUISANCE.

1. Public nuisance causing special damage, gives individual right of action, 172.
2. Continuing nuisance enjoined. *Ibid.*
3. Encroaching on sidewalk for cellar stairs, whether *per se* a nuisance; or whether city may allow. *Ison vs Manley*, 209.

NULLITIES. See *Judgments*, 1, 2.

OFFICER.

1. *De facto*, acts good, till ejected. *Smith et al. vs. Bohler et al*, 546.
See *Criminal Law*, 4; *Jury and Jurors*, 9; *Executions*, 7.

ORDINARY.

1. Guardian can only be appointed in term of court. *Bell vs. Love*, 125.
2. Letters of administration, general jurisdiction as to. *Barclay et al. vs. Kimsey et al.*, 725.
3. Same: Irregularities, grant not collaterally attacked for. *Ibid.*
4. Adjourned term, letters granted at, but not in vacation. *Ibid.*
5. Same: Publication completed between regular and adjourned term, grant not void. *Ibid.*

6. Accounts, equity and court of ordinary have concurrent jurisdiction. *Ibid.*

PARENT AND CHILD.

1. Child injured by negligence, actual damages only recovered by father. *Augusta Factory vs. Barnes*, 217.
2. Emancipation sought to be shown, accounting to father for wages admissible. *Ibid.*
3. Money advanced by mother to son and note taken, is *prima facie* debt, not advancement. *Cutliff vs. Boyd et al., ex'rs*, 302.

PARTIES.

1. Injunction granted without proper parties, error. *Miller, trustee, vs. McDonald et al.*, 20.
2. Want of, not reached by general demurrer for want of equity. *Hughes et al. vs. Hughes et al.*, 173
3. Stranger to contract, though to receive benefit thereunder, cannot bring action of covenant thereon. *Gunter vs. Mooney*, 205.
4. Administratrix being party, binds all distributees. *Barclay et al. vs. Kimsey et al.*, 725.
5. Administratrix being party, and appointed guardian *ad litem* for minors, no other order needed. *Ibid.*
6. Non-resident kin not added by amendment to caveat to application for administration, on appeal. *Long et al. vs. Huggins et al.*, 776.

See *Practice in Supreme Court*, 4, 5, 55, 57; *Continuance*, 4.

PARTITION.

1. Is not a proceeding *in rem*; binds only parties served. *Childs et al. vs. Hayman*, 791.
2. Absentee from state, under §4007 of Code, construed. *Ibid.*
3. Objections allowed under §4002 of Code, apply in cases where necessary to sell in order to divide. *Ibid.*
4. *Bona fide* purchaser whose rights not affected by re-hearing, who is. *Ibid.*

PARTNERSHIP.

1. Firm assets first applied to firm debts and individual assets to individual debts. *Bagwell vs. Bagwell*, 92. (See No. 6 below.)
2. Barred, claim for settlement after dissolution is not, until firm

- affairs as to debtors and creditors wound up. *Prentice vs. Elliott*, 154.
3. Interest on funds advanced by partner not allowed, unless by agreement express or implied. *Ibid.*
 4. Advances by partner are not account stated. *Ibid.*
 5. Service, entry of on "defendants, J., B. & Co., in person," not void for uncertainty. *Peel, trustee, vs. Bryson*, 331.
 6. Firm assets go first to firm debts and individual assets to individual debts, in case of insolvency. *Keese vs. Coleman & Co.*, 658. (See No. 1 above.)
 7. Same: Application of individual assets to individual debt not extinguish firm mortgage. *Ibid.*
 8. Individual promise not relieve firm debt of bar of limitations. *Ford vs. Clark. adm'r*, 760.
 9. Individual promise is new cause of action from firm debt. *Ibid.*
 10. Title conveyed to two members, though bought with firm money and for them, firm is equitable owner and may mortgage. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.
 11. Same: Mortgage, interest of partners joining in, bound; *aliter* of member not joining. *Ibid.*
 12. Fraudulent transfers to avoid paying debt assumed on dissolution, void. *Ibid.*
 13. Mortgage *fi. fa.* against firm, though one member did not join, effect of. *Ibid.*

PAWNS. See *Negotiable Instruments*, 10-12.

PAYMENT. See *Partnership*, 7; *Executions*, 7, 8; *Distress Warrants*, 5-6; *Limitations, Statute of*, 17.

PILOTAGE.

1. *Thompson vs. Sprague, Soule & Co.*, 69 Ga., 409, affirmed. *Dale & Wells vs. Daniels*, 207.
2. Wreck brought in, sold and re-fitted, is new vessel; same pilot not entitled to carry out. *Meissner vs. Stein*, 234.
3. Compensation, rights of pilots as to. *Ibid.*

See *Criminal Law*, 5; *Practice in Supreme Court*, 5.

PLEADINGS.

1. Sworn to, one plea being, sufficient to prevent judgment by default; others need not be unless dilatory or *non est factum*. *Parmelee vs. Williams*, 42.

2. Partial failure of consideration, substantial plea of, in this case. *Morgan et al. vs. Printup Bros. & Pollard*, 66.
3. Total failure of consideration, plea includes partial failure. *Ibid.*
4. Justification, test whether plea amounts to. *Augusta Factory vs. Barnes*, 217..
5. Injury and damage sufficient to set out, without stating all details. *Smith et ur. vs. Eubanks & Hill*, 280.
6. Judgment against distributee of estate on his debt to estate not rendered without pleadings for that purpose, bill being to subject estate in distributees' hands *Cade, trustee, vs. Hatcher et al.*, 359.
7. At law, in nature of bill for specific performance *Ensign vs. Sharp*, 708.
8. Equitable plea to ejectment stricken, equitable verdict wrong in this case. *Wofford vs. Wyly et al.*, 863.
See *Res Adjudicata*, 2; *Liens*, 12, 13.

POSSESSION. See *Trespass*, 1-2.

PRACTICE IN SUPERIOR COURT.

1. Uncondition contract in writing, issuable defence on oath necessary to prevent judgment. *Parmelee vs. Williams*, 42.
2. Same: One sworn plea sufficient; others need not be sworn to, unless dilatory or *non est factum*. *Ibid.*
3. Preliminary examination as to confessions had in presence of jury, if admissible, no new trial; *aliter* if rejected. *Ander-son vs. State*, 98.
4. Demurrer, bill not dismissed on, before return term. *Murphy vs. Tallulah, etc., Co.*, 196.
5. Judgment by default not set aside on *ex parte* statement of counsel as to parol agreement of attorneys. *Exchange Bank vs. Elkan*, 196.
6. Motion for new trial, for points of practice as to, see New Trial.
7. Attorneys may comment on all that transpires in a case. *In-man vs. State*, 269.
8. Joke by judge, no ground for new trial. *Smith et ur. vs. Eubanks & Hill*, 280.
9. Open and conclude, under bill to enjoin common law suits, complainant has right. *Guess et al. vs. St. Mountain, etc., Co.*, 320.
10. Leading questions to witness in discretion of court. *Cade, trustee, vs Hatcher et al.*, 359.

11. Discovery sought in bill, defendant afterwards put on stand, *status* as witness. *Ibid.*
12. Open and conclude, defendant introducing no evidence has right to. *Ibid.*
13. Discovery prayed, answer is in without being offered by defendant. *Ibid.*
14. Demurrer renewed after amendment to bill, goes to whole. *Griffin vs. Augusta & K. Railroad*, 423.
15. Demurrer, notice of not given, not work its dismissal. *Ibid.*
16. Jury stricken from grand jury in discretion of court. *Burge et al. vs. Hamilton et al., ex'rs*, 568.
17. Bailiff in charge of jury not sworn, new trial. *Roberts vs. State*, 673.
18. Evidence illegally admitted and then ruled out, generally cures error. *Powell vs. Watts*, 770; (Exception to rule. *McDonald vs. State*, 55.)
19. Chancellor of another circuit presiding, authority when to be objected to. *Cottle et ur. vs. Harrold, Johnson & Co.*, 830.
20. Appeal dismissed, if record shows no judgment. *Strohecker, ex'r, vs. Dessau*, 900.
21. Same: Time allowed to perfect record, if asked. *Ibid.*
22. Appeal dismissed, because no judgment shown, record subsequently perfected, re-instatement is matter of discretion. *Ibid.*

See *Non-suit*, 1, 2; *Auditors*, 3.

PRACTICE IN SUPREME COURT.

1. Directions given to court below. *Miller, trustee, vs. McDonald et al.*, 20; *Head vs. Bridges et al.*, 30; *Carlton et al. vs. So. Mut. Ins. Co. et al.*, 371.
2. Service of bill of exceptions by sheriff and entry after filing, good. *Head vs. Bridges et al.*, 30.
3. Affidavits on hearing of motion for new trial not authenticated by judge, grounds dependent on, not considered. *McDonald vs. State*, 55.
4. Lower court, judges of, not parties to appeal from judgment; cannot except. *Comm'rs, etc., vs. Tabbott*, 89.
5. Pilotage, commissioners of, cannot except to ruling on case appealed from them. *Ibid.*
6. Errors should be plainly specified. *Anderson vs. State*, 98; *Lamar vs. State*, 205; *Board of Education, etc., vs. Mayor, etc., of Brunswick et al.*, 353. (See No. 46 below.)

7. "Fast" bill of exceptions not transmitted in fifteen days, dismissed. *Markham vs. Huff*, 106.
8. Original papers divided among printers and defaced, case dismissed. *Ibid.*
9. Original papers not to be taken from clerk's office. *Ibid.*
10. Remarks or rebuke by court to counsel no ground of exception. *Smith vs. State*, 114.
11. Attached to brief of evidence, copy of account to be, by consent, sufficient identification, what is. *Floyd, ex'x, vs. Cox*, 147.
12. Verdict contrary to charge, objection that, same as contrary to law. *Hughes et al. vs. Hughes et al.*, 173.
13. Former rulings between other parties different from present case. *Ibid.*
14. Direct exception proper from dismissal of illegality; not motion for new trial. *Artope et al. vs. Barker*, 186.
15. Questions not made in court below not made here. *Rumph vs. Cleveland*, 189; *Lowery vs. State*, 649; *O'Brien et al. vs. White*, 900. (See No. 66 below.)
16. Damages for frivolous appeal. *Sutton vs. Robinson*, 195.
17. Injunction case not made returnable to later term than fixed by law, by agreement. *DeLoach vs. Trammell et al.*, 198.
18. Same: Dismissed for want of prosecution at first term, not reinstated by agreement. *Ibid.*
19. Bill of exceptions not signed because judge does not know to be true, *mandamus* to compel signing discharged. *Platen, relator, vs. Adams, judge*, 199.
20. *Mandamus vs. judge*, answer of judge not traversible. *Ibid.*
21. Certificate of clerk to bill of exceptions, none, dismissal without motion. *Harris, ex'r, vs. Butler*, 203.
22. Dismissed more readily where verdict appears to be required. *Ibid.*
23. Judgment *coram non judice* reversed, on exceptions. *Patterson et al., comm'rs, vs. Hendrix et al.*, 204.
24. Interest of person ceasing by withdrawal of claim, he cannot except. *Hicks et al. vs. Cohen*, 210.
25. Rule *nisi* against clerk and counsel for taking outer sheet from bill of exceptions, discharged, under facts. *Darby vs. Wesleyan Female College*, 212.
26. Filed, though by mistake, outer sheet cannot be taken off and new filing had. *Ibid.*
27. Service acknowledged after first filing, writ dismissed. *Ibid.*

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28. *Certiorari*, petition not sanctioned, not part of record; must come up in bill of exceptions. *Warren vs. State*, 215; *Watson vs. McCarty*, 216.
 29. Evidence, manner of bring up with and without motion for new trial. *Woodward et al. vs. Stillwell*, 215.
 30. Written evidence cannot be abbreviated without consent. *Ibid.*
 31. Interrogatories, whether abbreviated, not decided. *Ibid.*
 32. Certificate omitting to state that bill of exceptions is true, fatal. *Parmelec vs. Sav., Fla. & W. Rwy.*, 216.
 33. Service acknowledged after filing, case dismissed. *Finney vs. Hood et al.*; *Thurman vs. Culverhouse*; *Walker vs. Banks, trustee*, 216.
 34. Error without injury, no reversal. *Augusta Factory vs. Barnes*, 217.
 35. Tried together, distinct garnishments being, separate writs of error proper. *Papke, Reid & Phelps vs. Meador*; *Smith & Bondurant vs. Meador*, 230.
 36. Error in one's favor no ground for reversal. *Partee vs. Ga. R. R.*, 347.
 37. Record shows general grant of new trial, bill of exceptions states special ground, former controls. *Poullain et al. vs. Poullain, Sr.*, 412.
 38. Costs taxed by Supreme Court in this case. *Ibid.*
 39. Non-suit directly excepted to, or motion to re-instate first made. *Aiken vs. Peck & Allen et al.*, 434.
 40. Original papers put in brief of evidence by consent, motion to dismiss refused. *Sluder vs. Bartlett*, 463.
 41. Transcript regular here, whether this court can go behind this for irregularities. *Ibid.*
 42. Brief of evidence agreed on, no dismissal because documentary evidence not copied in full. *Baker & Hall vs. Gladden, sh'ff*, 469.
 43. Affidavits used on motion identified and filed under order, may come up in record. *Schmertz & Co. vs. Johnson*, 472.
 44. Entire charge, exception to, too general. *Rogers vs. Tillman*, 479.
 45. Language of judge in rendering decision, not subject of exception. *Smith et al. vs. Bohler et al.*, 546.
 46. Assignment of errors in charge, what substantially sufficient. *Parker, adm'r, vs. Glenn et al.*, 637. (See No. 6 above).
 47. Diminution, suggestion takes precedence of motion to dismiss. *Davis vs. Bennett*, 762.

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48. Original record sent up, instead of copy, diminution proper. *Ibid.*
 49. *Laches* in failing to correct record so as to be heard at first term diminution not allowed; case dismissed. *Ibid.*
 50. Obliteration in bill of exceptions, unexplained, work dismissal. *Ibid.*
 51. Same: Cannot be corrected. *Ibid.*
 52. Correction of bill of exceptions, rule as to, and result of erasures, etc. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.
 53. Illegible, disorderly or erased bill of exceptions, *mandamus* not granted to compel signing. *Ibid.*
 54. Abstracts, importance of, urged. *Ibid.*
 55. Individual cannot except to rulings against corporation of which he is president. *White vs. Barlow*, 887.
 56. Assignment of error on refusal to admit "certain statements" in evidence, without setting them out, bad. *Ibid.*
 57. Injury, none to party disclaiming title, by ruling or recovery, as to others. *Ibid.*
 58. Error without injury not require reversal. *Ibid.*
 59. Long paragraphs of charge, exception to, bad. *Ibid.*
 60. Evidence brought up in bill of exceptions, not in record, on exception to non-suit. *Hobbs vs. Longstreet*, 898.
 61. Dismissal without motion, where evidence in record instead of in bill of exceptions. *Ibid.*
 62. Re-instate case dismissed for want of prosecution, court will, counsel being detained by providential cause and sending communication which failed to reach court. *Brooks vs. State*, 899.
 63. Same: *Aliter*, if nothing in case. *Ibid.*
 64. Confused and unintelligible record, affirmance results. *Ogletree vs. Sharp, adm'r*, 899.
 65. Show error, plaintiff in error must. *Ibid.*
 66. Agreed case, not decided by court below, this court will not determine. *Ibid.*

PRESUMPTIONS.

1. Errors will be corrected on new trial. *Hamilton vs. Price*, 214.
2. Malice from character of charge in libel. *Pearce vs. Brower*, 243.
3. Natural and legal consequences of act intended. *Montross vs. State*, 261.

4. Notice given to creditors named in application for homestead, before approval. *Chalker vs. Thompson et al.*, 478.
5. Notice, that proof of was required before grant of order of sale to save expenses. *Wilson vs. Garrick et al.*, 660.
6. Corporation acquires right to cut ditch in manner pointed out by charter. *White vs. Barlow*, 887.
7. Payment of note produced from effects of deceased debtor. *Liddell, adm'r, vs. Wright, adm'r*, 839.

PRINCIPAL AND AGENT.

1. Ratification of illegal transactions, receipt and use of proceeds is. *Ingraham vs. Barber*, 158.
2. Ratification prevents suit against agent for wrong done. *Ibid*,
3. Wilful trespass of agent, master liable for when. *Lockett vs. Pittman*, 815.

See *Master and Servant*; *Mortgage*, 10-11.

PRINCIPAL AND SURETY.

1. Discharged, surety is, by allowing time, with higher interest, to acceptor who fails. *Parmelee vs. Williams*, 42.
2. Payment of *fi. fa.* gives right to control, though no entry made. *Thomason, ass're, vs. Wade et al.*, 160.
3. Entry made pending claim case, sufficient. *Ibid*.
4. Bail, defendant under, arrested on another charge and giving bond, not release sureties on first bond. *Hartley et al. vs. Colquitt, gov'r*, 351.
5. Same: Sureties in first bond not released because sureties in second advised flight. *Ibid*.
6. State depository, notice that bank is, puts on inquiry whether president is on bond. *Colquitt, gov'r, vs. Simpson & Ledbetter*, 501.
7. Same: Forged signature of one surety on bond delivered by president of bank, following his signature, not relieve him as surety. *Ibid*.
8. Same: Purchasers from president with notice of bond, not released by forgery of one surety's name. *Ibid*.
9. State depository, bad selection by governor, not relieve surety on bond. *Mathis, sheriff, vs. Morgan*, 517.
10. Representations of governor not relieve surety with opportunity for inquiry. *Ibid*.
11. Surety entrusting bond to principal, other sureties to be ob-

tained, delivery to governor with forged signature and receiving public funds, surety not released. *Ibid.*

PROMISSORY NOTES.

1. "Value received," shown by parol to have been a contract of hiring, which had failed; *aliter*, if consideration stated. *Pitts vs. Allen*, 69.
2. Hire of person of full age from another, note for, illegal. *Ibid.*
3. Due "on or before" day named, is at option of maker. *James vs. Benjamin*, 185.
4. "On or before" in note, not ambiguous. *Ibid.*
5. Sealed instrument, words "witness our hand and seal" not make, without actual seal or scroll. *Willhelms vs. Partoine*, 898.
6. Presumed paid, where produced from effects of deceased debtor. *Liddell, adm'r, vs. Wright, adm'r*, 899.

See *Negotiable Instruments*.

PUBLIC POLICY. See *Promissory Notes*, 2.

QUO WARRANTO.

1. Conduct of relators considered on hearing application for leave to file. *Dorsey et al. vs. Ansley et al.*, 460.
2. Conduct of relators in connection with election as to estop them, writ denied. *Ibid.*

See *Constitutional Law*, 9.

RAILROAD COMMISSION. See *Railroads*, 15, 16.

RAILROADS.

1. Criminal negligence, contract to waive right to sue for, void. *Cook vs. W. & A. R. R.*, 48.
2. Husband killed by falling into cut, same defences against wife's action as against him. *Berry vs. N. E. R. R.*, 137.
3. Same: Want of ordinary care is defence. *Ibid.*
4. Road crossings, duty as to keeping in repair. *Ibid.*
5. Lying on track, whether person is from sickness or drunkenness, left to jury. *S. W. R. R. vs. Hankerson*, 182.
6. Employé injured, no negligence shown, non-suit proper. *Stanley vs. Richmond, etc., Extension Co.*, 202.

7. Negligence in killing stock is for jury. *Sav., Fla. & W. Rwy. vs. Stewart*, 207.
8. Tax, counties and towns cannot. *Co. of Houston vs. C. R. R.*, 211.
9. Negligent or wilful tort of servant about business, road liable for. *W. & A. R. R. vs. Turner*, 292.
10. Passenger, person in freight cab treating for passage, as commonly done, stands as. *Ibid.*
11. Passengers, through freights may refuse; but must be done politely. *Ibid.*
12. Discharge of employé committing tort, effect on exemplary damages. *Ibid.*
13. Running through street, on suit by owners of abutting property possible collisions or fright of animals not part of damages. *Guess et al. vs. St. Mountain, etc., Co.*, 320.
14. Same: Measure of damages; improvement of property considered. *Ibid.*
15. Commissioners' rules as to passenger rates and keeping open offices do not apply to freight trains. *Partee vs. Georgia R. R.*, 347.
16. Regulation reasonable in this case. *Ibid.*
17. Port Royal & Augusta R. R., under re-organization, is not a foreign corporation. *Griffin vs. Aug. & K. R. R.*, 423.
18. Several lines, first acts as forwarding agent of shipper in giving instructions to others. *Bird vs. Ga. R. R.*, 655.
19. Mistake in route by which goods sent, made by first road, last road without notice has lien for freight. *Ibid.*
20. *Aliter*, if last road had notice. *Ibid.*
21. Demand on last road and refusal to deliver without payment of freight makes conversion and gives jurisdiction. *Ibid.*
22. Same: Marks on goods considered on question of notice. *Ibid.*
23. Floor in cotton yard, duty as to keeping in repair. *Central Railroad vs. Gleason & Harmon*, 742.
24. Same: Contributory negligence, doctrine applies to defective floor. *Ibid.*
25. Storehouse for fertilizers, right to use in city, when. *Mayor, etc., of Athens vs. Ga. R. R.*, 800.

See *Constitutional Law*, 2; *Garnishment*, 3.

RECEIVER. See *Homestead*, 6.

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RES ADJUDICATA.

1. By former ruling of Supreme Court. *Cook vs. W. & A. R. R.*, 48; *Inman, Swann & Co. vs. Foster, trustee, et al.*, 79; *Southwestern R. R. vs. Hankerson*, 182; *King vs. Davidson*, 192; *Guess et al. vs. St. Mountain, etc., Co.*, 320; *Hartley et al. vs. Colquitt, gov'r*, 351; *Griffin vs. Augusta and K. R. R.*, 423.
2. Plea of not disposed of in vacation, but used as objection to injunction. *Masland, Jr., vs. Kemp*, 182.

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1. Railroad crossing, duty of railroad to keep in repair. *Berry vs. N. E. R. R.*, 137.
2. Commissioners' court, what notice of sufficient to defaulter. *Sims et al. vs. Hutcheson et al., comm'rs*, 437.
3. Notice to work roads, what sufficient. *Ibid.*
4. Fine for default enforced by execution or imprisonment. *Ibid.*

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1. Set aside sale under *fi. fa.*, power of court issuing to. *Johnson et al. vs. Dooly et al.*, 297.
- See *Levy and Sale; Year's Support*, 2.

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SERVICE.

1. On firm, entry of served "defendants, J., B. & Co., in person," not void. *Peel, trustee, vs. Bryson*, 331.
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SHERIFFS.

1. Execution against, how directed and levied. *Blance & McGarough vs. Mize*, 96.
2. Disqualification to levy, how made to appear. *Ibid.*
3. Fine, prisoner released on promise of third party to pay, not re-arrested on failure. *Williams vs. Mize, sh'ff*, 129.

4. Costs of rule, former sheriff liable for, on failure to pay amount collected, on demand. *Sutton vs. Robinson*, 195.
5. Failure to levy on cattle, rule for, discharged by showing cattle beyond jurisdiction. *Morgan vs. Spring, sheriff*, 257.
6. Illegality based on own negligence, no excuse to sheriff for failure to make money. *Ibid.*
7. Collusion of sheriff with defendant is for jury. *Ibid.*

See *Levy and Sale*.

SOUTHERN MUTUAL INSURANCE COMPANY. See *Insurance*, 1-9.

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STATE DEPOSITORIES.

1. President furnishing bond, puts purchasers from him on inquiry whether he is a surety. *Colquitt, gov'r, vs. Simpson & Ledbetter*, 501.
2. Surety, president not relieved as, because name of co-surety on bond furnished by him forged. *Ibid.*
3. Officers, depositories are not; are *sui generis*. *Ibid.*
4. Bond accepted and kept in office, entry of filing and recording not necessary. *Ibid.*
5. Recital in *fi. fa.* of governor *prima facie* correct. *Ibid.*
6. Bond executed before appointment made, not affect validity. *Ibid.*
7. Forged, name of surety, not bind, unless ratified; purchaser from surety gets good title. *Colquitt, gov'r, vs. Smiths*, 515. (See No. 11 below.)
8. Bad selection by governor not relieve surety on bond. *Mathis, sheriff, vs. Morgan*, 517.
9. Representations of governor, not release surety with equal chance of inquiry. *Ibid.*
10. Faithful account of public money, whether received from tax collectors or treasurer, sureties bound for. *Ibid.*
11. Forgery of signature of one surety not relieve another who entrusted bond to principal to obtain other sureties and deliver bond, and enabled it to receive public funds. *Ibid.*

STATUTE OF LIMITATIONS. See *Limitations, Statute of*.

STOCK AND STOCKHOLDERS. See *Corporations*, 4, 5.

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STREETS AND SIDEWALKS.

1. Whether encroachment on sidewalk for cellar stairs is *per se* a nuisance. *Quære? Isom vs. Manley*, 209.
 2. Railroad running through street, measure of damage of owner of abutting property. *Guess et al. vs. St. Mountain, etc., Co.*, 320.
 3. Slight elevations or depressions by displacing paving, etc., suits for, discouraged. *City of Atlanta vs. Bellamy*, 420.
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SUNDAY.

1. Advertisement of marshal's sale for taxes in Sunday paper, illegal. *Sawyer vs. Cargile*, 290.

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1. Overplus from sale of unreturned property, how disposed of. *Summers, ord'y, vs. Christian et al.*, 193.
2. Railroads, counties and towns have no power to tax. *County of Houston vs. Central Railroad*, 211.
3. Advertisement of marshal's tax sale on Sunday illegal. *Sawyer vs. Cargile*, 290.
4. Educational tax, levied under act entitled "to regulate public education." *Smith et al. vs. Bohler et al.*, 546.
5. Educational tax levied by taking tax collector's digest. *Ibid.*
6. Time in discretion of board of education, slow to interfere with. *Ibid.*
7. Excessiveness must be plainly shown, to authorize interference. *Ibid.*
8. Collector's bond covers school tax paid to him. *Ibid.*
9. Advances to pay tax of trust estate is charge on. *Griffin et al. vs. Fleming, ex'r, et al.*, 697.

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TIME. See *Contracts*, 17; *Tax*, 6.

TITLE.

1. Gift, exclusive possession of land of father by son raises presumption of; except when. *Hughe et al. vs. Hughes et al.*, 173.

2. Agreement to make deed does not alone carry title. *Heard, ex'r, et al. vs. Palmer, adm'r*, 178.
3. Possession of ancestor followed by heirs for eighteen years makes *prima facie* case in ejectment. *Wood et al. vs. Haines*, 190.
4. Title to cow to be used in payment for work did not pass, under facts of case. *Toomer vs. Coleman*, 213.
5. Tax title, under marshal's sale advertised on Sunday, void. *Sawyer vs. Cargile*, 290.
6. Innocent purchaser at sheriff's sale, irregularities not affect. *Parker, adm'r, vs. Glenn et al.*, 637.
7. Partners buying and paying, title conveyed to two of firm quit-able title is in firm. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.
8. Second purchaser gets no title against first purchaser from same vendor, with bond for title, purchase money paid and possession. *Clarke et al. vs. Beck*, 127.

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1. Convict in chain-gang beaten, county not liable. *Hammond vs. County of Richmond*, 188.
2. Convict injured by another or by guard, city not liable. *Doster vs. City of Atlanta*, 233.
3. Tort and contract, actions on compared. *Smith et ux. vs. Eubanks & Hill*, 280.
4. Lease, failure to comply with terms of, and eviction, damages for. *Ibid.*
5. Husband and wife jointly sued, where husband acted for wife. *Ibid.*
6. Negligent or wilful tort of servant, railroad liable for. *W. & A. R. R. vs. Turner*, 292.
7. Apportionment of damages among trespassers by verdict does not apply to personal tort. *McCalla vs. Shaw*, 458.

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TRESPASS.

1. Possession of land taken by real owner is not trespass, though claimed by another. *Scott vs. Mathis*, 119.
2. Actual damages only recovered for taking possession *bona fide* under mistaken claim. *Ibid.*

3. Enjoined as ancillary to leading equity of bill. *Stokes et al. vs. Weems et al.*, 179.

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TROVER.

1. Conversion may be waived, and suit brought for money had and received. *Toomer vs. Coleman*, 213.
2. Railroad carrying over route contrary to directions, with notice, and refusing to deliver until freight paid, is conversion. *Bird vs. Ga. R. R.*, 655.

TRUSTS AND TRUSTEES.

1. Mutual insurance, directors retaining reserved fund from profits are *quasi* trustees for contributors. *Carlton et al. vs. So. Mut. Ins. Co. et al.*, 371.
2. Profits for self out of trust, trustee cannot make. *Dowling vs. Feeley et al.*, 557.
3. Losses from venture with trust fund falls on him. *Ibid.*
4. Appropriate excess of price over estimated value, trustee cannot. *Ibid.*
5. Same: Fiduciary relations, all persons in, same as trustees as to profits and losses. *Ibid.*
6. Expenditures for minor beneficiary, limit as to. *Ibid.*
7. Taxes and repairs, advances for, are charges on trust, though during life tenancy. *Griffin et al. vs. Fleming, ex'r, et al.*, 697.
8. Implied, where firm buys and title conveyed to two members. *Cottle et ux. vs. Harrold, Johnson & Co.*, 830.

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1. *Bona fides* not prevented by knowledge of judgment alone. *Sluder vs. Bartlett*, 463.
2. Judgment, notice of, considered with other facts. *Ibid.*
3. Security deed, purchaser with notice, from holder, takes subject to equities. *Wofford vs. Wyly et al.*, 863.
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1. Non-suit held improper by Supreme Court, verdict for plaintiff not set aside. *Cook vs. W. & A. R. R.*, 48.
2. Required in these cases. *Lewis vs. State*, 164; *Walker vs. State*, 200; *Hudson vs. State*, 201; *Brown vs. State*, 211; *Pryor vs. Goldsmith Bros., agts.*, 214; *Montross vs. State*, 261.
3. Form of verdict, if lesser offence found than charged, proper charge as to. *Walker vs. State*, 200.
4. Supported by evidence in these cases. *Lambert vs. State*; *Brown vs. State*; *Smith vs. State*, 216.
5. *Seriatim*, exceptions to auditor's report to be passed on, what sufficient. *Cutliff vs. Boyd et al., ex'rs*, 302; *Poullain et al. vs. Poullain, Sr.*, 412.
6. Form suggested in actions for deceit. *Peel, trustee, vs. Bryson*, 831.
7. Joint tort to person, verdict apportioning damages illegal. *McCalla vs. Shaw*, 458.
8. Equitable verdict after equitable plea in ejectment stricken, wrong. *Wofford vs. Wyly et al.*, 863.

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1. Conversion may be waived, and suit brought for money had and received. *Toomer vs. Coleman*, 213.
2. Warranty waived as such, and action of deceit brought on same. *Peel, trustee, vs. Bryson*, 331.

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WARRANTY.

1. Waived as such, and action of deceit brought on same. *Peel, trustee, vs. Bryson*, 331.

WATER AND WATER COURSES.

1. Mill-dam, increasing height producing sickness, enjoined. *Minor et al. vs. De Vaughn*, 208.

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1. Conveyance to take effect after death is will. *Heard, ex'r, et al. vs. Palmer, adm'r*, 178.

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2. Lost, what insufficient to establish copy. *Moseley vs. Evans et al.*, 203.
 3. Witnesses, character not in issue unless attacked. *Ibid.*
 4. Witness not sworn, bad character not shown. *Ibid.*
 5. *Corpus* to be held together until youngest child becomes of age; then divided equally, without regard to prior income, under will in this case. *Hayne, adm'r, vs. Dunlap et al.*, 534.
 6. Pages and numbering raising ambiguity as to what constituted will, shown by parol. *Burge et al. vs. Hamilton et al., ex'rs*, 568.
 7. Ambiguities explained by parol. *Ibid.*
 8. Papers constituting will shown by parol. *Ibid.*
 9. Statements of testator to identify will. *Ibid.* (See No. 16 below.)
 10. Latitude, more allowed on probate than on construction. *Ibid.*
 11. Codicil affirming will, makes latter valid, if not so before. *Ibid.*
 12. Part identified not refused probate because of unknown missing parts. *Ibid.*
 13. Altered, will being, after execution, codicil re-publishing and annexed thereto, makes valid. *Ibid.*
 14. Same: Alteration shown by parol to have been made before codicil. *Ibid.*
 15. *Revocavit vel non* and *devisavit vel non* are questions for jury. *Ibid.*
 16. Same: Sayings of testator as to, admissible. *Ibid.*
 17. Unnatural will, legacy to wife's kin is not. *Ibid.*
 18. Undue influence not shown in this case. *Ibid.*
 19. Construed. *Griffin et al. vs. Fleming, ex'r, et al.*, 697; *Huggins et al. vs. Huggins et al.*, 825; *Olmstead vs. Dunn et al.*, 850.
 20. Testamentary character, test of. *Anderson, adm'r, vs. Brown*, 713.
 21. *Per capita* and not *per stirpes*, legatees under will in this case take. *Huggins et al. vs. Huggins et al.*, 825. (See No. 28 below.)
 22. Formalities of execution, reason for. *Olmstead vs. Dunn*, 850.
 23. Will is law of property conveyed. *Ibid.*
 24. Construed each for itself. *Ibid.*
 25. Surrounding circumstances aid in construction. *Ibid.*

26. Life estate, with vested remainder, but open to take in children afterwards born, in this case. *Ibid.*
27. Life estate, with remainder over, both contingent on death of daughter childless, in this case. *Ibid.*
28. *Per capita*, not *per stirpes*, legatees take, in this case. *Ibid.*
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1. Inaccessible in criminal case, testimony on committing trial shown by parol. *Smith vs. State*, 114.
2. Dead, vendor and purchaser both being, person claiming under purchaser competent against a trespasser. *Scott vs. Mathis*, 119.
3. Dead, attorney being, client suing estate for money collected, defendant in *fi. fa.* incompetent to show payment. *Daniel, adm'x, vs. Burts, adm'x*, 143.
4. Same: Release of defendant in *fi. fa.* by plaintiff not make him competent. *Ibid.*
5. Dead, though father is, on question of gift to son, between his heirs and family of father, son's administrator competent to show sayings of father. *Hughes et al. vs. Hughes et al.*, 173.
6. Hand-writing, opinion of any person who swears to knowledge, admitted. *Ibid.*
7. Credibility for jury. *Walker vs. State*, 200.
8. Accomplice, whether boy witness was, or was coerced, left to jury. *Beal vs. State*, 200. (See No. 20 below.)
9. To will, character not shown, except when. *Moscley vs. Evans et al.*, 203.
10. Impeached, not believed unless corroborated. *Saul vs. Buck, Hefflebower & Neer*, 254.
11. List of witnesses furnished accused not exclude new witnesses. *Inman vs. State*, 269.
12. Leading questions, in discretion of court. *Cade, trustee, vs. Hatcher et al.*, 359.
13. Leading questions allowed in bill for discovery. *Ibid.*
14. Discovery prayed, defendant becomes complainant's witness. *Ibid.*
15. Impeached by contradictory sayings, may be sustained by general good character. *Price vs. State*, 441.
16. Impeached by testimony on other occasion. *Smith vs. Page, adm'r, et al.*, 539.
17. Same: Foundation need not be laid, where interrogatories or affidavits made in same case. *Ibid.*

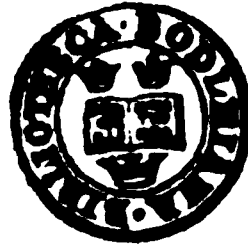
18. Impeachment, failure to charge on, not require new trial. *Ibid.*
19. Sustained, may be, if impeached in any way. *Dowling vs. Feeley et al.*, 557.
20. Accomplice, person present and for a time concealing fact is not. *Lowery vs. State*, 649. (See No. 8 above.)
21. In jail, witness being, officer to serve compulsory process furnished, defendant being unable. *Roberts vs. State*, 673.
22. Same: Expenses, tender of money to pay, not necessary. *Ibid.*
23. Same: Act of 1883 cumulative. *Ibid.*
24. Dead defendant, though conversation with involved in admissions of claimant, plaintiff may prove. *Powell vs. Watts*, 770.
25. Dead, though defendant in *fi. fa.* is, plaintiff and claimant are competent. *Ibid.*

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1. Criminal negligence in railroad defined. *Cook vs. W. & A. R. R.*, 48.
2. Chose in action and chose in possession defined. *Sterling, adm'r, vs. Sims*, 51.
3. "On or before," in promissory note. *James vs. Benjamin*, 185.
4. "Next term" means next term to which law directs return. *Rivers vs. Hood*, 194.
5. "Keep mill-dam up to" a mark on a stump, includes right to raise water to mark. *Sitton vs. Cureton et al.*, 201.
6. "Passenger," when one becomes a. *W. & A. R. R. vs. Turner*, 292.
7. "Actual notice," what constitutes. *Johnson et al. vs. Dooly et al.*, 297.
8. "Member" and "stockholder" in mutual insurance company. *Carlton et al. vs. So. Mut. Ins. Co. et al.*, 371.
9. "Employing" and "hiring" servant, difference. *Hightower vs. State*, 482.
10. "In writing," contract not necessarily signed by both parties. *Ibid.*
11. "Regulate" education, power to, includes levy of tax for. *Smith et al. vs. Bohler et al.*, 546.
12. "Servant" means domestic servant, when. *Lockett vs. Pittman*, 815.
13. "In writing," contract for interest not necessarily signed by debtor. *Semble. Wofford vs. Wyly et al.*, 863.

YEAR'S SUPPORT.

1. Superior to mortgage, under facts of case. *Miller, trustee McDonald et al.*, 20.
2. Sold and re-invested by wife for self and second husband, bad. *Vandigrift et al. vs. Potts*, 665.
3. Same: Equity of purchaser as to proceeds. *Ibid.*



ERRATA.

Page 129, next to last line of head-note, read "for a failure " instead of " of," etc.

Page 184, last of head-note, read " 331, 742," instead of " 405."

Page 188, last head-note, read " 59 *Id.* " instead of " 58 *Id.*"

Page 200, 5th head-note, read "credibility" instead of "credulity."

Page 204, Navel's case, head-note (a), read "agreement of counsel" instead of "argument of counsel."

Page 298, top line, read " Geo. F. Gober ; W. R. Power."

Page 347, head-note (b), strike out " above."

Page 364, 4th line, read " Heisler " for " Hayden."

Page 422, read " 65 *Ga.*," for " 63 *Ga.*"

Page 697, in name of case, read " administrator " instead of " executor."

Page 773, read " 48 *Ga.*," instead of "47 *Ga.*"



